S. HRG. 108–216

ARIZONA WATER SETTLEMENTS ACT

JOINT HEARING

BEFORE THE

SUBCOMMITTEE ON WATER AND POWER

OF THE

COMMITTEE ON
ENERGY AND NATURAL RESOURCES

AND THE

COMMITTEE ON INDIAN AFFAIRS

UNITED STATES SENATE

ONE HUNDRED EIGHTH CONGRESS

FIRST SESSION

ON

S. 437

TO PROVIDE FOR ADJUSTMENTS TO THE CENTRAL ARIZONA PROJECT IN ARIZONA, TO AUTHORIZE THE GILA RIVER INDIAN COMMUNITY WATER RIGHTS SETTLEMENT, TO AUTHORIZE AND AMEND THE SOUTHERN ARIZONA WATER RIGHTS SETTLEMENT ACT OF 1982, AND FOR OTHER PURPOSES

SEPTEMBER 30, 2003

Printed for the use of the
Committee on Energy and Natural Resources
and the Committee on Indian Affairs

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ARIZONA WATER SETTLEMENTS ACT

TUESDAY, SEPTEMBER 30, 2003

U.S. SENATE,
SUBCOMMITTEE ON WATER AND POWER OF THE
COMMITTEE ON ENERGY AND NATURAL RESOURCES,
AND THE COMMITTEE ON INDIAN AFFAIRS,
Washington, D.C.

The subcommittee and committee met, pursuant to notice, at 10 a.m. in room SD–366, Dirksen Senate Office Building, Hon. Lisa Murkowski presiding.

OPENING STATEMENT OF HON. LISA MURKOWSKI, U.S. SENATOR FROM ALASKA

Senator MURKOWSKI. Good morning. I call to order the Subcommittee on Water and Power. Good morning to all of you. I would like to take this opportunity to welcome all the parties to this morning's joint hearing before the Water and Power Subcommittee and the Indian Affairs Committee. I would like to express my appreciation to you, Senator Campbell, for agreeing to work together on this legislation and to extend a special welcome to Senator Inouye.

The legislation before us today is quite monumental. What began roughly over a decade ago is of significant importance to two States, numerous tribes, several communities, and many, many individuals. It is my understanding that upon enactment and implementation, settlement of the Gila River Indian Community's claims would be one of the largest Indian water rights settlements ever undertaken. So I commend everyone for all of the efforts that have gone into the settlement thus far.

Now, while this hearing represents a significant step forward, I also know that not all concerns have been addressed and some degree of compromise on a variety of issues still lies ahead. Therefore, I look forward to hearing from all of our witnesses today.

At this time I would like to invite other Senators to make opening statements. I do understand that there are several of you that have conflicting commitments. Appropriations is meeting at this same time. Senator Kyl, as the sponsor of S. 437, we would anticipate your statement, but as a courtesy to both Senator Campbell and Senator Inouye, who do have to go to another committee, I would like to invite you to make your statements at this time, and then we will recognize those other Senators as they have arrived.

Senator Campbell.

[The prepared statements of Senators Murkowski and McCain follow:]

PREPARED STATEMENT OF HON. LISA MURKOWSKI, U.S. SENATOR FROM ALASKA

I would like to take this opportunity to welcome all the parties to this mornings joint hearing before the Water and Power Subcommittee and the Indian Affairs Committee. I would like to express my appreciation to Senator Campbell for agreeing to work together on this legislation and to extend a special welcome to Senator Inouye.

The legislation before us today is quite monumental. What began roughly over a decade ago is of significant importance to two states, numerous Tribes, several communities, and many, many individuals. It is my understanding that upon enactment and implementation, settlement of the Gila River Indian Community's claims would be one of the largest Indian water rights settlement ever undertaken. I commend everyone for all of the efforts that have gone into this settlement thus far.

While this hearing represents a significant step forward, I also know that not all concerns have been addressed and some degree of compromise on a variety of issues still lies ahead. Therefore, I look forward to hearing from all of our witnesses here today.

PREPARED STATEMENT OF HON. JOHN MCCAIN, U.S. SENATOR FROM ARIZONA

I want to thank the Chairmen of the Indian Affairs and Energy and Natural Resources Committees for holding this hearing on the Arizona Water Settlements Act of 2003, a bill of great significance to the future of Arizona and its citizens. I also want to commend my colleague, Senator Kyl, for all the effort that he has expended to bring this complex legislation to this point in the process. The legislation would ratify negotiated settlements for Central Arizona Project (CAP) water allocations to municipalities, agricultural districts and Indian tribes, state CAP repayment obligations, and final adjudication of long-standing Indian water rights claims.

These settlements reflect more than five years of intensive negotiations by state, federal, tribal, municipal, and private parties. I want to recognize the extraordinary commitment of all the parties represented in this agreement. From my experience in legislating past agreements, I recognize the enormous challenge of these negotiations, and I appreciate their personal dedication to this settlement process.

This legislation is vitally important to Arizona's future because these settlements will bring greater certainty and stability to Arizona's water supply by completing the allocation of CAP water supplies. Pending water rights claims by various Indian tribes and non-Indian users will be permanently settled as well as the repayment obligations of the state of Arizona for construction of the CAP.

I join Senator Kyl in expressing my support for the agreements embodied in this bill and encouraging thoughtful conclusion of this settlement process. Significant progress has been made in resolving key issues since we last sponsored a bill to facilitate this agreement in the 107th Congress. Some of these key issues pertain to the final apportionment of CAP water supplies, cost-sharing of CAP construction and water delivery systems, amendment of the 1982 settlement agreement with the Tohono O'odham Nation, mitigation measures necessitated by sustained drought conditions, and equitable apportionment of drought shortages.

While this bill reflects agreements reached on a host of issues, it is important to emphasize that the legislation may be modified as the negotiations continue. There are parties that are engaged in water rights litigation that may find that becoming part of this legislated settlement will provide a more satisfactory and expeditious resolution of claims. I encourage all the parties involved to continue to work diligently toward the successful conclusion of this process. The future passage of the Arizona Water Settlements Act will be an historic accomplishment that will benefit all citizens of Arizona, the tribal communities, and the United States.

STATEMENT OF HON. BEN NIGHTHORSE CAMPBELL, U.S. SENATOR FROM COLORADO

Senator CAMPBELL. Thank you, Madam Chairman, and thank you very much for doing this hearing. As you know, we are marking up the President's emergency supplemental for Iraq and Afghanistan in Appropriations today, so I will only stay for a few minutes because I need to be at that committee too, as Senator Inouye does.

But I want to commend Senator Kyl, the Gila River Indian Community, and the States of Arizona and New Mexico for their work on this very important bill. As a sponsor of a very, very difficult Indian water rights settlement act in Colorado that took over 15 years, I know firsthand how incredibly difficult these issues can be. Even though Indian people certainly have a right, an early priority water right, to water running within the boundaries of the State, changes in demographics and populations and many other things have made it very, very complicated to actually give them the right that they certainly deserve.

S. 437 is no exception. It represents the product of many years of hard work by all of the parties involved. By settling the Central Arizona Project issues, implementing the Gila River water rights settlement, and addressing Southern Arizona Water Rights Settlement, S. 437 is a large and very complex bill. The committee will hear from the witnesses today. I will read with great interest all the testimony that is turned in, but I am hopeful that there are areas we can improve and the two committees will be able to work together, as we always do, to make sure that we do our best to expedite this bill. I think it is extremely important.

Thank you, Madam Chairman.

Senator MURKOWSKI. Thank you.

Senator Inouye.

STATEMENT OF HON. DANIEL K. INOUYE, U.S. SENATOR FROM HAWAII

Senator INOUYE. Thank you very much, Madam Chairman.

In the interest of time to receive the testimony of witnesses this morning, I would just like to welcome Governor Narcia of the Gila River Indian community, Chairperson Saunders of the Tohono O'odham Nation, President Shirley of the Navajo Nation, and Chairwoman Kitcheyan of the San Carlos Apache Tribe, and to assure my colleague from Arizona, Senator Kyl, that I look forward to working with him to assure passage of this very important measure.

Thank you very much, Madam Chairman.

Senator MURKOWSKI. Thank you.

Senator Kyl.

STATEMENT OF HON. JON KYL, U.S. SENATOR FROM ARIZONA

Senator KYL. Thank you, Madam Chairman and Chairman Campbell, and I know that the members of the Appropriations Committee will have to attend that markup, that very important markup, and I therefore fully appreciate why you cannot be here the entire time. But I can certainly assure many of my friends from Arizona who are here that all of you have taken this very seriously and have studied up on the issue and will continue to study more even though you are not here for much of the hearing today, and I appreciate that very, very much.

I also want to thank Senator Campbell, Senator Murkowski, and Senator Domenici for being willing to hold this hearing at this time. We have waited a long time, the water users in Arizona, for this day, and the bill is the product of 14 years of negotiation and litigation and then more negotiation. Virtually every major water

user and provider in central Arizona has devoted itself to the passage of this bill.

In fact, S. 437 would codify the largest water claim settlement in the history of our State. The three titles in the bill represent the tremendous efforts of literally hundreds of people in Arizona and here in Washington, as I said, over this period of 14 years.

Looking ahead, the bill could ultimately be nearly as important to Arizona's future as was the authorization of the Central Arizona Project itself. Since Arizona began receiving CAP water from the Colorado River, litigation has divided water users over how the CAP water should be allocated and exactly how much Arizona was required to repay the Federal Government. Those of you who assisted Arizona on the CAP will recall that Arizona under the CAP legislation always committed to repay a portion of the project back to the Federal Government, something on the order of from a third to about 40 percent, and litigation arose as to exactly how much that repayment was and how it was to be accomplished.

Well, this bill, among other things, codifies the settlement reached between the U.S. Government and the Central Arizona Water Conservation District, the entity that runs the CAP, over the State's repayment obligation for costs incurred by the United States in constructing the Central Arizona Project.

By the way, I might add for my Democratic colleagues, some of the genius in figuring out how to do this, supporting a lot of different Federal interests, came originally from Bruce Babbitt, who was then Secretary of the Interior, knew the issues very, very thoroughly as a result of his background in Arizona as well. So I attribute a lot of the good ideas in the settlement to Secretary Babbitt.

The settlement will also resolve once and for all the allocation of all remaining CAP water. The final allocation will provide the stability necessary for State water authorities to plan for Arizona's future water needs. In addition, approximately 200,000 acre-feet of CAP water will be made available to settle various Indian water claims in the State. The bill would also authorize the use of the Lower Colorado River Basin Development Fund, which is funded solely from revenues paid by Arizona entities and people, to construct irrigation works necessary for the tribes with Congressionally approved water settlements to use their CAP water, really converting their paper water rights to wet water for the first time.

Madam Chair, title 2 of the bill settles water rights claims of the Gila River Indian Community. It allocates nearly 100,000 acre-feet of CAP water to the community and provides funds to stabilize the costs of delivering CAP water and to construct the facilities necessary to allow the community to fully utilize the water allocated to it in this settlement.

Title 3 provides for long-needed amendments to the 1982 Southern Arizona Water Settlement Act for the Tohono O'odham Nation, which has never been fully implemented.

This bill will allow Arizona cities to plan for the future knowing how much water they can count on. The Indian tribes, as I said, will finally get wet water as opposed just to the paper claims that they now have, and they will have projects to use their water. In addition, mining companies, farmers, and irrigation districts can

continue to receive water without fear that they will be stopped by this litigation.

While some minor issues remain, we still have every confidence that those issues will be resolved before we actually mark up the bill. In particular, the States of Arizona and New Mexico have been negotiating the best way to address New Mexico's right under the 1968 Boulder Canyon Project Act, which authorized the CAP, to exchange 18,000 acre-feet of CAP water on the Gila River. The States are meeting regularly and report that they are making progress.

In addition, we hope that negotiations with the San Carlos Apache Tribe, the only party not yet included in the settlement, will move forward so that all claims can be resolved by this bill, and there is a title specifically reserved for that settlement should we be able to accomplish that result.

In summary, this bill is vital to the citizens of Arizona and will provide the certainty needed to move forward with water use decisions. Furthermore, the United States can avoid litigating water rights and damage claims and satisfy its trust responsibility to the tribes. The parties have worked many years to reach consensus rather than litigate and I believe this bill represents the best opportunity to achieve a fair result for all of the people of Arizona.

I want to thank everyone from Arizona who has traveled here today to attend this hearing and again thank all of the members of the committee who have been here at least up to now. Thank you, Madam Chairman.

[The prepared statement of Senator Kyl follows:]

PREPARED STATEMENT OF HON. JON KYL, U.S. SENATOR FROM ARIZONA

Madam Chairman, Chairman Campbell, I would first like to thank you and Chairman Domenici for holding this hearing. The water users and providers of Arizona have waited a long time for this day. The bill before our committees, the Arizona Water Settlements Act (S. 437), is the product of fourteen years of negotiation, litigation, and more negotiation. Virtually every major water user and provider in central Arizona has devoted itself to the passage of this bill. In fact, S. 437 would codify the largest water claims settlement in the history of Arizona. The three titles in this bill represent the tremendous efforts of literally hundreds of people in Arizona and here in Washington over a period of fourteen years. Looking ahead, this bill could ultimately be nearly as important to Arizona's future as was the authorization of the Central Arizona Project (CAP) itself.

Since Arizona began receiving CAP water from the Colorado River, litigation has divided water users over how the CAP water should be allocated and exactly how much Arizona was required to repay the federal government. This bill will, among other things, codify the settlement reached between the United States and the Central Arizona Water Conservation District over the state's repayment obligation for costs incurred by the United States in constructing the Central Arizona Project. It will also resolve, once and for all, the allocation of all remaining CAP water. This final allocation will provide the stability necessary for state water authorities to plan for Arizona's future water needs. In addition, approximately 200,000 acre-feet of CAP water will be made available to settle various Indian water claims in the state. The bill would also authorize the use of the Lower Colorado River Basin Development Fund, which is funded solely from revenues paid by Arizona entities, to construct irrigation works necessary for tribes with congressionally approved water settlements to use CAP water.

Madam Chairman, Mr. Chairman, title II of this bill settles the water rights claims of the Gila River Indian Community. It allocates nearly 100,000 acre-feet of CAP water to the Community, and provides funds to subsidize the costs of delivering CAP water and to construct the facilities necessary to allow the Community to fully utilize the water allocated to it in this settlement. Title III provides for long-needed amendments to the 1982 Southern Arizona Water Settlement Act for the Tohono O'odham Nation, which has never been fully implemented. This bill will allow Arizona cities to plan for the future, knowing how much water they can count

on. The Indian tribes will finally get "wet" water (as opposed to the paper claims to water they have now) and projects to use the water. In addition, mining companies, farmers, and irrigation delivery districts can continue to receive water without the fear that they will be stopped by Indian litigation.

While some minor issues remain, we have every confidence that these issues will be resolved before we mark-up the bill. In particular, the states of Arizona and New Mexico have been negotiating the best way to address New Mexico's right under the 1968 Boulder Canyon Project Act (authorizing the CAP) to exchange 18,000 afy of CAP water on the Gila river. The states are meeting regularly and report that they are making progress. In addition, we hope that negotiations with the San Carlos Apache Tribe, the only party not yet included in the settlement, will move forward so that all claims can be resolved by this bill.

In summary, this bill is vital to the citizens of Arizona and will provide the certainty needed to move forward with water use decisions. Furthermore, the United States can avoid litigating water rights and damage claims and satisfy its trust responsibilities to the Tribes. The parties have worked many years to reach consensus rather than litigate, and I believe this bill represents the best opportunity to achieve a fair result for all the people of Arizona.

Senator MURKOWSKI. Thank you, Senator Kyl.

Senator Bingaman.

STATEMENT OF HON. JEFF BINGAMAN, U.S. SENATOR FROM NEW MEXICO

Senator BINGAMAN. Thank you very much for having this hearing. Let me welcome all the witnesses and thank Senator Murkowski and Senator Kyl, Senator Murkowski for having the hearing, Senator Kyl for all the work that has gone into this complex piece of legislation.

This bill as I understand it would ratify a series of water settlements that are very important to the State of Arizona. It involves resolution of issues concerning the Central Arizona Project, as Senator Kyl indicated, a reclamation project that was authorized in 1968 to furnish water both to Arizona and to New Mexico.

The Central Arizona Project settlement also attempts to address the U.S. trust responsibility to Arizona Indian tribes by facilitating several important Indian water rights settlements. I know this is a difficult negotiation to get to this point and I congratulate all the parties for the work that has gone into it. Nevertheless, the legislation involving the allocation of water from the Colorado River does affect a number of different interests. This bill, S. 437, addresses a large number of CAP issues, but there are some New Mexico-related issues that I believe should also be addressed as part of a settlement.

These issues arise as the result of the provisions in the 1968 Colorado River Basin Project Act that were intended to ensure that water users in New Mexico could benefit from the construction of the Central Arizona Project. Given that S. 437 provides a certain and final resolution to so many CAP issues, it seems to me appropriate to provide that same level of certainty for New Mexico's portion of the project that was authorized 35 years ago.

Today, we have our State Engineer from New Mexico, John D'Antonio, testifying. I look forward to hearing his testimony on New Mexico issues related to this bill. It is my understanding that discussions are under way, as Senator Kyl indicated, between New Mexico and Arizona parties to resolve some of the outstanding issues, and I appreciate the willingness of the Arizona parties to work with New Mexico representatives to resolve these issues.

Speaking as a representative from New Mexico, as a Senator from New Mexico, let me just say that it is not New Mexico's intention to delay the bill, but instead just to assure that all appropriate issues are being addressed. S. 437 is a very important piece of legislation and I look forward to working with you, Senator Kyl, and with Senator Murkowski and all the rest of my colleagues here, Senator Campbell, to make sure that the issues are resolved and that we can move ahead with legislation.

Thank you.

Senator MURKOWSKI. Thank you.

Senator Akaka.

STATEMENT OF HON. DANIEL K. AKAKA, U.S. SENATOR FROM HAWAII

Senator AKAKA. Thank you very much, Madam Chairman and Chairman Campbell. Thank you for holding this hearing.

Water is one of the most important natural resources in our country and especially for Indian country. I want to commend Senator Kyl, Senator McCain, and Senator Johnson for their efforts to bring forth this legislation to codify the largest water claims settlement in Arizona, in Arizona's history, and resolve some, as Senator Kyl mentioned, 14 years of negotiations.

This is all about reserved water, and what has been happening in our country is that Indian country has lost some of its rights to reserved water, and this will certainly help the cause. We are looking forward to this being a model for other settlements as well. Also I am looking forward to having this bill to be a model not only for the Gila River Indian Community, but for other tribes in the country as well. And I look forward to working with Senator Kyl on this bill.

Thank you.

[The prepared statement of Senator Akaka follows:]

PREPARED STATEMENT OF HON. DANIEL K. AKAKA, U.S. SENATOR FROM HAWAII

I thank Chairman Campbell and Chairman Murkowski for holding this joint hearing today. Water is one of our most important natural resources, and for Indian Country, it is the bounty of their homelands. In the past, Native peoples would relocate to other parts of the land if their crops, fish and wildlife were no longer plentiful. Now, they must remain on their designated homelands. They must wisely utilize the resources available to them. However, increased demand over this limited resource by communities outside of Indian Country has diminished the right of tribes to "reserved water." These communities are expanding and drawing from this valuable resource. While tribes have sought litigation to enforce their water rights, in many cases, the economic and social costs of litigation have forced them to seek compromises. These compromises have resulted in what is before us today, S. 437, the Arizona Water Settlements Act.

I look forward to hearing the testimony from our witnesses to discuss the intent of this legislation and its ramifications on Indian Country. While I commend Senators Kyl, McCain, and Johnson for their efforts to bring forth this legislation to codify the largest water claims settlement in Arizona history and resolve some 13 years of negotiations, I wish to ensure that by codifying this legislation, we are not hurting other tribal governments that are also seeking settlements for their water rights. It has been said that this legislation may be used as a "model" for other settlements. Therefore, it is imperative that Congress ensures that this legislation will help not only the Gila River Indian Community, but other tribes in Indian Country. Again, I wish to thank the Chairmen for holding this important hearing.

Senator MURKOWSKI. Thank you.

Senator Domenici is also participating in the Appropriations markup of the supplemental and it is unlikely that he will be able to attend this morning. He has submitted a statement and asked that I read it so that all of you can hear his comments this morning, and I also have some questions that I will be asking on his behalf. So again, this is a statement from Senator Domenici:

The Arizona Water Settlements Act is of great importance to the State of Arizona. Any time parties successfully negotiate a water settlement, it is a substantial achievement. I commend Senator Kyl for his hard work, as well as each of the parties for the compromises made to reach this agreement.

This bill is also extremely important to the State of New Mexico. One of the elements originally part of the Central Arizona Project was a New Mexico diversion and storage unit. This unit would have allowed New Mexico to contract and exchange up to 18,000 acre-feet of CAP water for Gila River water to be used in New Mexico. While Arizona has witnessed completion of its portion of the CAP, New Mexico is still waiting for construction to begin on its unit.

Additionally, because the New Mexico project was authorized as a unit of the CAP, it should be financed in part out of CAP funds under this settlement. Under the 1968 act and current CAP contracts, CAP users would be required to proportionally fund 98.7 percent of the New Mexico unit. In 1987 the Bureau of Reclamation estimated the capital cost of the New Mexico unit at $142 million.

In its current form, S. 437 would utilize the Lower Basin Development Fund to subsidize $1.6 to $2.2 billion in Arizona projects. Because Congress intended New Mexico to be a beneficiary of the CAP, sufficient funds should be dedicated from the Lower Basin Development Fund to partially support the New Mexico unit as well.

I assure you, it is not my objective to prevent this settlement from moving forward. But it is my intent to see that the commitments made to New Mexico by Congress in 1968 are fairly considered. I believe that S. 437 is designed to be a comprehensive settlement of Central Arizona Project water issues, including allocations, payments, and funding. Therefore, I feel any comprehensive settlement should also include to the greatest extent practicable a resolution of outstanding New Mexico issues as well. I simply cannot support a settlement until the interests of New Mexico are protected.

I understand that parties in both States have met numerous times and continue trying to reach an agreement that will accommodate both States. I understand that a list of issues has been identified and, while consensus has been reached on a couple of issues, there are still several outstanding items in need of resolution, including mechanisms for New Mexico accessing CAP water.

I stand ready to do what I can to help facilitate a consensus with regard to the outstanding issues in this settlement so that New Mexico's interests are protected and advanced. I will gladly hold additional hearings, both here in Washington or out in the State, if it becomes necessary and will aid the parties in reaching agreement.

Once again, I commend all the parties involved for their dedication and commitment to this very important legislation. I look forward to working with you all to address the concerns of the State of New Mexico and I look forward to moving this bill expeditiously once those concerns have been adequately addressed.

Again, that was the statement of Senator Domenici.

So, with that, I would like to introduce our first panel this morning, representing the administration. We have: Bennett Raley, the Assistant Secretary of Water and Science; and Aurene Martin, Acting Assistant Secretary of Indian Affairs. Good morning and welcome to the committee.

Mr. Raley.

STATEMENT OF BENNETT W. RALEY, ASSISTANT SECRETARY, WATER AND SCIENCE, DEPARTMENT OF THE INTERIOR, ACCOMPANIED BY AURENE MARTIN, ACTING ASSISTANT SECRETARY FOR INDIAN AFFAIRS

Mr. RALEY. Good morning. Madam Chair, thank you. Senators, thank you. It is a pleasure to be here, particularly so when we are addressing an issue, a suite of issues, the resolution of which is of

vital importance to the Department of the Interior. The Department takes very, very seriously its trust responsibilities. It takes very, very seriously its responsibility to forward certainty for water users and the people of Arizona and New Mexico.

This effort, which has been noted by Senator Kyl and others stretches back over 14 years, it is one of the most complex Indian water rights settlements that the Department has been engaged in in decades. The resolution of these issues is of critical importance. It is our judgment that all of the entities are within striking distance of success. As the members of this committee know, sometimes when parties do not take that extra step to get to success the window of opportunity does not open for a long time.

We believe that the window of opportunity is open today, and I pledge to you on behalf of the Secretary and the Department of the Interior our utmost efforts to bring this effort to fruition and to provide the resolution of these issues.

As the Senators have noted, S. 437 has three substantial components. Title 1 is the negotiated settlement in the Central Arizona Water Conservancy District litigation with the United States. Title 2 approves the Gila River Indian Community water rights settlement, and title 3 makes necessary amendments to the 1982 Southern Arizona Water Rights Settlement Act. Each one of those components is critical and we believe that they are all worthy of proceeding.

A number of issues have been raised in the opening statements by Senators, some of which we have addressed in the written testimony that I have submitted on behalf of the Department. I would like to draw attention to three issues and then allow Assistant Secretary Martin to make any comments if she wishes, but to preserve as much time for the Senators to ask questions as possible.

The three issues that I would point to would be: First, we all understand that S. 437 has a complex and innovative financing mechanism that operates outside of the normal appropriations process. The administration is currently reviewing the funding provision to determine whether it is the most appropriate way to proceed. We are not aware at the Department of alternative methods of proceeding, but we are going to work hard to achieve success, and we will be spending as much time with the participants in this effort as will be productive to find a way to get to success, because a long-term funding mechanism is required by the stipulation. It is essential for this effort to be successful.

The second issue that I would draw attention to is that the Department believes that additional efforts to address issues associated with the San Carlos Apache Tribe will be productive and will allow this bill to proceed.

Third, as has been noted, the Department is very anxious to have this effort supported by both Arizona and New Mexico so that it can be supported by the Senate and the administration. We again pledge to the representatives of the States and to each of you that we will do everything we can as an administration to help facilitate an agreement between two States that are very important to the Department.

In closing, Madam Chair, I would like to return to my earlier comment. The window is open. Let us not risk, over what in retro-

spect may be minor details, the chance for success, the chance for bringing closure to what otherwise will be very, very divisive issues. It is not worth the risk.

Thank you, Madam Chair, and I would like to allow Assistant Secretary Martin to make any comments if she wishes to add anything.

[The prepared statement of Mr. Raley follows:]

PREPARED STATEMENT OF BENNETT W. RALEY, ASSISTANT SECRETARY, WATER AND SCIENCE, DEPARTMENT OF THE INTERIOR

Good morning Mr. Chairman and members of the Committee. I am Bennett W. Raley, Assistant Secretary for Water and Science at the Department of the Interior. I am accompanied by Aurene Martin, Acting Assistant Secretary for Indian Affairs. I appreciate the opportunity to appear before this Committee to discuss S. 437, a bill to authorize the Arizona Water Rights Settlement Act of 2003.

S. 437 is the single most far-reaching piece of federal legislation regarding water use within Arizona since Congress authorized the Central Arizona Project thirty-five years ago. S. 437 is an impressive and complex bill, designed to provide a comprehensive resolution of critical water use issues facing the State of Arizona, and Arizona Indian tribes today. This legislation provides certainty regarding the use of water in Arizona in a number of ways: it provides water to settle outstanding water rights claims of certain Arizona tribes; provides financing of infrastructure so that all tribes can put CAP water to use; and it provides water for future water rights settlements. It also provides water necessary to accommodate the explosive population growth in the cities of central Arizona; it provides certainty for farmers who currently utilize imported water supplies from the Colorado River; and it also provides a mechanism to secure water to protect against future droughts. These arrangements, necessary to all users of Colorado River water in Arizona are accomplished utilizing local tax revenues to accomplish the financing of all undertakings under the global settlement embodied in the legislation.

The Administration supports the core concepts of the settlements that are achieved through S. 437 and the overarching goal of resolving many important water challenges facing the State of Arizona, with the caveats discussed below. We believe that the comprehensive approach that is embodied in S. 437 is the right way to resolve these longstanding disputes regarding the use of the CAP and this portion of Arizona's allocation to the Colorado River.

Before providing detailed comments on particular provisions of the bill, some of which will require addressing outstanding concerns, it is necessary to review the overall structure and goals of S. 437. As we move forward, this Administration remains committed to working with the Committee, Senator Kyl, and the settlement parties to reach mutually agreeable solutions to all remaining issues. The resolution of these outstanding issues is an extremely high priority for the Department of the Interior.

BACKGROUND

Even in the days before statehood, Arizona's leaders saw the need to bring Colorado River water to the interior portions of the State. During the 1940's and 50's California developed facilities allowing the utilization of more than its apportionment from the Colorado River and quickly began full use of its share of the river, and more. During that same time, Arizona began developing its own plans for utilization of its 2.8 maf apportionment. However, California effectively prevented Arizona from implementing its plans, arguing that development and use of water from Colorado River tributaries within Arizona counted against its apportionment and limited significant additional development and diversion from the mainstream by Arizona.

Unable to reach resolution on this issue, in 1952 Arizona brought an original action in the U.S. Supreme Court, asking the Court to clarify and support Arizona's apportionment from the Colorado. After 12 years of fact finding by a Special Master and arguments by the two states, the Supreme Court issued a decision in 1963 affirming Arizona's 2.8 maf apportionment.

Despite Arizona's victory in the Supreme Court, California was still able to extract a final concession from Arizona. In exchange for California's support of Congressional authorization in 1968 for the Central Arizona Project (CAP), Arizona was forced to allow its CAP water to have a subservient priority to California water use during times of shortage on the Colorado River system. This was a significant con-

cession since CAP water use represents more than half of Arizona's Lower Basin apportionment—approximately 1.5 maf of its 2.8 maf. The CAP brings this critical supply from the Colorado River through Phoenix, to Tucson, Arizona via a primary canal of more than 330 miles.

After decades of fighting to get the CAP authorized and constructed, in the early 1990's Arizona faced financial and water supply disputes over how the Project—and the State's allocation from the Colorado River—would be utilized.

For most of the 1990's uncertainty existed for Arizona: uncertainty over who would receive water from the CAP, and uncertainty over the costs of the project and who would repay those costs. Perhaps most importantly to the State, uncertainty existed over the ability of the State to store water and protect against the eventual shortages on the Colorado—which have a unique impact on Arizona water users due to the junior status imposed by Congress in 1968.

The uncertainty also involved complex and contentious litigation filed in 1995 between the federal government and the Central Arizona Water Conservation District, the political entity which operates the CAP and repays the local costs of the project. After years of litigation over the CAP, extensive negotiations were conducted to resolve the complicated CAP issues so that the needs of all project beneficiaries would be adequately addressed.

During these discussions it became clear that financial repayment and other operational issues could not be resolved until there was a firm agreement on the amount of CAP water that would be allocated to federal uses, i.e., allocations to Indian tribes in Arizona. When these discussions were initiated, 32% of the CAP water was allocated for Federal uses, 56% for Non-Federal uses and 12% was un-contracted.

Both the United States and the State of Arizona were interested in dedicating uncontracted water to allow settlement of outstanding Indian water rights claims and to meet emerging needs for municipal purposes. The amount of water needed for future Indian water rights settlements within Arizona turned in large part on consideration of the large pending claim of the Gila River Indian Community (Community) in the on-going general stream adjudication of the Gila River system. The Gila River Indian Reservation encompasses approximately 372,000 acres south of, and adjacent to, Phoenix, Arizona.

The claim filed by the United States on behalf of the Community in the Gila River adjudication was for 1.5 million AFA. This represents the largest single Indian claim in Arizona—and one of the largest Indian claims in the West. If this claim were successful, the amount of water available to central Arizona cities, towns, utilities, industrial and commercial users, and major agricultural interests would be greatly reduced.

Consequently, on-going negotiations of that claim were put on a parallel track with the CAP litigation negotiations, with the understanding that tandem resolution of the issues would be necessary. The underlying premise of the settlement that emerged—including the framework of this legislation—is to achieve a comprehensive resolution of all outstanding CAP issues. This, in turn, will allow sustainable operation of the CAP in a manner that provides benefits and equitable treatment to all intended project beneficiaries. The alternative, piecemeal and sequential resolution of all of the outstanding disputes on the CAP, would be doomed to fail.

The linkage embodied in this legislation integrates U.S. obligations under Federal statutes and the trust relationship with Indian tribes. As with the initial authorization of the CAP in 1968, we are presented with a unique opportunity to provide a final settlement of many of the complex Federal, State, Local, Tribal and private water issues in the State.

In May of 2000, the Department and CAWCD reached agreement on a stipulated settlement of the CAP litigation. This stipulation serves as a blueprint for a comprehensive resolution of the suite of CAP issues I have identified above. The stipulation requires that a number of conditions must occur before it is effective or final. Under the stipulation, these conditions must occur before December 2012 or the stipulation will terminate.

The *CAWCD* v. *U.S.* settlement stipulation is contingent on Congressional enactment of a Gila River Indian Community Settlement; Amendment of the Southern Arizona Indian Water Rights Settlement (SAWRSA); and the identification of a firm funding mechanism for the CAP, GRIC and SAWRSA settlements.

SETTLEMENT STIPULATION & S. 437: THE ARIZONA WATER RIGHTS SETTLEMENT ACT OF 2003

S. 437 approves three separate and significant settlements: the settlement stipulation reached in the *CAWCD* v. *U.S.* litigation (addressing CAP operational and repayment issues), the Gila River settlement (addressing water rights claims of the

Gila River Indian Community), and the SAWRSA settlement (addressing water rights claims of the Tohono O'Odham Nation).

The basic structure of the stipulation developed in 2000 is preserved in S. 437, subject to certain conditions. The main components of the settlement contained in S. 437 are to provide: (1) additional water to resolve tribal claims; (2) certainty regarding allocation of available water supply; (3) additional water supplies for Arizona's growing cities; (4) financial and operational certainty for CAWCD (operator and repayment entity of CAP); (5) affordable water for non-Indian agriculture; (6) appropriate repayment of CAP costs; (7) structures and programs to bank water for Arizona's future; (8) and a firm funding mechanism to provide affordable water to tribes, while developing the infrastructure necessary to allow all of Arizona's tribes to fully utilize their CAP supplies.

The structure of S. 437 represents Arizona's extensive efforts to resolve these contentious issues. The bill is strongly supported by the relevant Arizona State Agencies, Members of Congress with Arizona constituencies, the Gila River Community, the Tohono O'odham tribe, and a wide array of Arizona interests. In light of the diverse parties, competing interests and longstanding controversies involved, S. 437, if amended to address certain issues, represents the best prospect to restructure the CAP in a context that reconciles the Public, Tribal and Private interests including statutory obligations of the United States.

I will summarize each of the three titles contained in S. 437 and comment on some of the provisions of each that are of concern to the Administration.

TITLE I—CENTRAL ARIZONA PROJECT SETTLEMENT

The critical components of the CAP stipulated settlement are set forth in Title I of S. 437. They include: (1) a final allocation of CAP water supplies so that 47% of Project water is dedicated to Arizona Indian tribes and 53% is dedicated to Arizona cities, industrial users and agriculture; (2) setting aside a final additional allocation pool of 197,500 acre-feet for use in facilitating the GRIC settlement and future Arizona Indian water rights settlements; (3) a final allocation of 65,647 AFA of remaining high priority (M&I) water to Arizona cities and towns; (4) relief from debt incurred under section 9(d) of the 1939 Reclamation Projects Act by agricultural water uses, which allows these users to relinquish their long term CAP water contracts so that the water can be used for the Indian water rights settlements and future municipal use; and (5) allowing the Colorado River Lower Basin Development Fund (LBDF), the Treasury fund where CAP repayment funds are deposited, to be used for the costs of Indian water rights settlements, completing tribal water delivery systems and reducing the cost of CAP water for tribes to affordable levels.

S. 437's utilization of the Colorado River Lower Development Fund is intended to meet the terms of the stipulation by providing for, among other things, subsidizing fixed OM&R costs for Indian tribes, including OM&R costs for the Gila River Indian Community, rehabilitation of the San Carlos Irrigation Project (SCIP), construction of Indian Distribution Systems, and funds for future Indian water settlements.

The financing mechanism assumed in S. 437 is complex, and operates outside of the normal appropriations process. Given this, the Administration is currently reviewing the funding provision to determine whether it is an appropriate way to satisfy the contingencies of the settlement. There may be other funding mechanisms that meet the firm funding requirement of the settlement. We look forward to working with the Committee on this issue.

TITLE II—GILA RIVER INDIAN COMMUNITY WATER RIGHTS SETTLEMENT

Title II of S. 437 is the Gila River Indian Community Settlement. This settlement would resolve all of the Community's water rights claims in the general stream adjudication of the Gila River system, litigation that covers much of the water supply of central Arizona. This litigation has been the subject of negotiation and settlement talks for more than 13 years.

The major components of the settlement are: (1) confirmation of existing, and dedication of additional, water supplies for the Community in satisfaction of its water rights claims; (2) use of existing facilities to deliver the additional water supplies; (3) funding for on-Reservation agricultural development; and (4) protection of the Reservation groundwater supplies.

While the United States supports a settlement of the Gila River Community's water claims, and believes the majority of the provisions of the Settlement Act in this title are consistent with that objective, we do have concerns, detailed below, that we want to work on with the Committee, Senator Kyl and the various parties to promptly resolve.

A. Inclusion of a Settlement With the San Carlos Apache Tribe

In resolving the water rights claims of the Gila River Indian Community, we must remain mindful not to place the United States in a position of having conflicting obligations to two Indian tribes. The Gila River Indian Community and the San Carlos Apache Tribe have reservations and existing decreed water rights in the same watershed. In litigation underlying the settlement, the United States has argued in favor of both the Gila River Indian Community's and the San Carlos Apache's water rights under the 1935 Globe Equity Decree. That Federal Consent Decree addresses the water rights of those tribes, as well as the rights of most non-Indian water users, in the mainstem of the Gila River above the confluence of the Gila and Salt rivers. The GRIC settlement will alter operations under the Gila Decree. These changes have the potential to impact the rights of the San Carlos Apache Tribe.

We believe that additional efforts to resolve the concerns of the San Carlos Apache Tribe should be taken, and Interior has engaged in a serious effort to do that. The Department has taken a number of steps in this regard and is prepared to do more. Interior officials have met with the San Carlos Tribal leaders on numerous occasions, and our sincere hope is that we can reach resolution on a wide array of issues so that agreement on the San Carlos Apache Tribe's water rights can be added to this legislation as it proceeds. We look forward to working with the Committee and the Tribes on this matter.

B. Waivers of the United States Enforcement Authorities

S. 437, as introduced, also includes significant waivers of the United States ability to enforce environmental statutes relating to water quality in the Gila River basin The settling parties seek to limit their exposure to environmental liability. However, the Administration believes the waivers, as currently drafted, may provide undue immunity from environmental liability and shift costs for cleanup to the Federal government. This could restrict the ability for the federal government to clean up the most contaminated waste sites in the Gila River Basin. For example, the legislation waives claims by the United States against both parties to the settlement as well as non-parties. As drafted, this legislation can also be interpreted to provide a waiver for future claims under certain environmental statutes, including those under the Superfund authority. This could restrict the ability for the federal government to cleanup the most serious hazardous waste sites in the Gila River Basin. These water quality waivers were not included in prior water rights settlements affecting Indian Tribes and are not necessary in this legislation.

Following the introduction of S. 437, the Department of Justice entered into discussions with the settlement parties regarding the waivers. These discussions continue to progress. The Administration is committed to continuing these discussions to find a solution to these significant issues, as this legislation must maintain the Federal government's ability to protect human health and environment.

C. Overly Broad Waiver of the United States Sovereign Immunity

The Administration also is concerned, as we believe that S. 437 contains an overly-broad waiver of United States sovereign immunity. We believe that this provision is unnecessary, as sovereign immunity waivers in the McCarran Amendment allow a suit against the United States to administer its adjudicated water rights. Further, if such a waiver is retained, it should be narrowly drafted. The Administration also has some concern about the scope of certain waivers under Section 312 of the bill.

D. Impacts of the Intended Water Exchanges

S. 437 authorizes several water exchanges between the Community and various parties in the State, including the Phelps Dodge Corporation, ASARCO and several municipalities in the Upper Gila River watershed. While we support the mechanism of water exchanges, we want to work with the committee to ensure that the current language adequately takes into account the water rights of the San Carlos Apache Tribe, parties affected in the State of New Mexico (under the Colorado River Basin Project Act), listed species and critical habitat under the Endangered Species Act (ESA), and rights to divert water in relation to the Globe Equity Decree. Previous analyses indicate that appurtenant structures and dams involved in this agreement could lead to more extensive and frequent Gila River drying, which, in turn, could lead to potential ESA conflicts.

E. Fifth Amendment Takings Concern

Title II places the ownership of all settlement water in the hands of Gila River Indian Community, notwithstanding the fact that the Gila Decree (the 1935 Globe Equity Decree) framed its award under that Decree "for the reclamation and irrigation of the irrigable Indian allotments on said reservation." We would like to refine

the language of the bill to reduce the likelihood that an individual allottee may assert a "takings" claim based on the settlement. Both Interior and Justice are committed to working with the settlement parties and the proponents of S. 437 to reduce any risk of a Fifth Amendment taking and to assure that the rights of individual Indian allottees are protected.

F. Costs Associated

Federal contributions to the proposed settlement within this Title include the fulfillment of existing statutory and programmatic responsibilities and the assumption of new obligations designed to put GRIC in a position to utilize the water resources confirmed or granted in the settlement. There are also numerous costs contained within this title, which the United States does not believe are reasonably related to the costs avoided and benefits received, and we look forward to working with the Committee and Senator Kyl prior to further consideration of this legislation to ensure the costs contained in the legislation are appropriate.

For example, given the correlative benefits, we support the rehabilitation and completion of the Indian portion of the San Carlos Irrigation Project (SCIP)—an irrigation project that was initiated in the 1930's but never completed and which has fallen into significant disrepair. However, we believe that the language of S. 437, requiring the Secretary to provide for the "rehabilitation, operation, maintenance and replacement" of the San Carlos Irrigation Project, needs to be refined. Our view is that both the cost control and indexing mechanisms for these expenditures need to be revisited.

Similarly, when looking at the government's cost of addressing subsidence damages on the reservation, we recognize the settlement requires the United States to repair past and future subsidence damage. We believe that federal liability for such damages should be limited.

Additionally, in some instances we believe that existing costs have been shifted from State parties to the United States, and those costs may be more appropriately addressed by other existing Federal programs. We believe disbursements from the Lower Basin Fund should be limited to those costs which have a direct relationship to the core concepts of the settlements addressed in S. 437.

We also believe that a closer look should be given to some of the costs included in the provisions of Title II, dealing with the Upper Gila River. One example is the costs identified to line San Carlos Irrigation and Drainage District (the non-Indian component of SCIP) canals so that water can be conserved. The Administration supports this concept but believes a greater share of the conserved water should be provided to the United States for possible use in settling the San Carlos Apache Tribe's water rights claims in the Gila River.

TITLE III—AMENDMENTS TO THE SOUTHERN ARIZONA WATER RIGHTS SETTLEMENT ACT (SAWRSA)

The Southern Arizona Water Rights Settlement Act, known as "SAWRSA," Pub. L. 97-293, was enacted in 1982 to resolve Indian water rights claims arising within the San Xavier and Shuk Toak Districts of the Tohono O'odham Nation. SAWRSA did not settle all outstanding Tohono O'odham water rights claims. Claims for the Sif Oidak District and other Reservation lands remain to be settled.

As originally enacted, SAWRSA allocated 37,000 AFA of CAP water to the San Xavier and Shuk Toak Districts of the Nation, together with another 28,200 AFA of water to be delivered from any source by the United States to the Districts. All of the water is to be delivered without cost to the Nation. The original settlement also requires the United States to rehabilitate and extend an historic allottee farming operation and design and construct irrigation facilities sufficient to put remaining settlement water to use.

Construction of all irrigation facilities and the full implementation of SAWRSA has not occurred, principally because of a disagreement over proper allocation of settlement benefits between the Nation and allottees within the San Xavier District. Because of this disagreement, the allottees have refused to join in the dismissal of *United States* v. *City of Tucson,* CIV. 75 39 TUC WDB (D. Ariz.), the litigation which lead to the enactment of the settlement. SAWRSA requires the United States, the Nation and the allottees to dismiss the litigation as a condition of full effectiveness of the settlement.

For over ten years, the Department of the Interior, the City of Tucson and other state parties have been engaged in discussions with the Nation and the allottees in an attempt to agree on amendments that would resolve disputed issues. The Nation and the allottees have now agreed on how settlement water resources and funds should be distributed. The agreements between the Nation and the allottees are contained in Title III of S. 437. Essentially, the Nation and the allottees have agreed

upon allocation of water resources, construction of new irrigation facilities and sharing of settlement funds.

In general, the Administration supports these agreements and we look forward to working with the Committee to clarify or refine a few items we remain concerned about. Chief among these is the so called "net proceeds" issue that revolves around the United States ability to make the Cooperative Fund a self sustaining fund and potential federal liability if it is not self sustaining or is under-funded.

CONCLUSION

It is important to emphasize that the Administration fundamentally supports this important settlement effort if it is amended to address concerns discussed above, and we look forward to working with the Committee to revise specific provisions of the legislation so that we can support the bill without reservation.

The Administration lauds the tremendous efforts dedicated by all parties to find a workable solution to this complex set of issues and supports the core settlement concepts and framework as set forth in S. 437. We recognize that this legislation will resolve long-standing and critical water challenges facing the State of Arizona. We look forward to working with the Committee, Senator Kyl, and the settlement parties to craft legislation that accomplishes these goals in a manner that comports with Federal financial policy and legal considerations.

This concludes my testimony. I would be pleased to answer any questions that the members of the Committee may have.

Senator MURKOWSKI. Thank you, Mr. Raley.

Ms. Martin.

Ms. MARTIN. Good morning, members of the committee. I would only echo Mr. Raley's support for further efforts to undertake discussions with the San Carlos Apache Tribe to try to reach settlement. I think that we feel it is very important that further efforts can and should be made, and that agreement is within our grasp.

Additionally, we also must ensure that individual allottee rights are addressed fully and completely within the settlement, and we look forward to further review and discussion on those issues as well.

Thank you.

Senator MURKOWSKI. Thank you. I appreciate the testimony and the opportunity to ask some further questions.

Both of you have mentioned the San Carlos Apache Tribe and we recognize that is the title that has been left blank here. Can you, either one of you, elaborate on the administration's view of what steps can be taken or are being taken to complete the negotiations in a timely manner?

Mr. RALEY. Madam Chair, we are aware that discussions are proceeding. We believe that the pace of those discussions needs to accelerate, but we as a Department are not in a position of feeling comfortable that it is helpful if we were to dictate or preordain the outcome of what ultimately need to be discussions that reach a common agreement between the parties. So we will be there in the negotiations and obviously the Department and the administration must be comfortable that the trust responsibility of the United States to all tribes is fulfilled, although we recognize ultimately Congress's authority to define what that is. I think that is all it would be appropriate for us to say at this point.

Senator MURKOWSKI. If this bill were to be moved forward in its current form, is there sufficient flexibility in your opinion to accommodate a settlement with the San Carlos Tribe?

Mr. RALEY. Although the bill in its present form has some open-ended or undefined funding aspects that make it impossible to calculate the exact expenditures, we believe that there is and we are

comfortable that there is the opportunity for addressing the needs of the San Carlos Tribe as a part of this legislation and within the funding mechanism identified in the legislation, assuming that that ends up being the preferred mechanism for proceeding.

Senator MURKOWSKI. You spoke a little bit about the funding mechanisms and that apparently is one of the, I do not know if we will call it a bugaboo—we will call it a bugaboo. What are the annual deposits to the Lower Basin Development Fund and what will the annual withdrawals pursuant to the act under consideration today—what is going to happen in terms of our withdrawals?

Mr. RALEY. Madam Chair, the annual income to the fund is between $40 and $50 million. Expenditures under this legislation, it is difficult at this point to tie that to the annual amounts because it depends on construction schedules, but we believe that, should this be the preferred alternative for funding this settlement, that the needs of all of the entities for funding under this mechanism could be met within the revenues that are produced to the lower basin fund.

Senator MURKOWSKI. Is it possible that the funds could be exhausted by the requirements of this legislation, of S. 437, prior to other tribes reaching water rights settlements? And if not, what part of the Lower Basin Development Fund would or could be available for use by other tribes, such as the White Mountain Apaches?

Mr. RALEY. Madam Chair, our assessment is that, should this be the preferred mechanism for funding, that there is capacity within that fund for addressing the reasonably anticipated needs of all participants in what would be a broader settlement. We do not believe that this legislation if it proceeds would result in that fund being exhausted and therefore not available for other settlements.

Senator MURKOWSKI. How many other tribes still have outstanding water rights claims?

Mr. RALEY. Well, as the Senator knows, there are two general stream adjudications and my understanding—and if you will allow me to refer to my notes here so I do not omit any of these tribes. Subject to confirmation, tribes without settlement would include: the Navajo Nation, Hopi, White Mountain Apache, Wallapi, San Juan Southern Payute, Camp Verde Apache, Pascoyaki, and Tohono Apache.

Senator MURKOWSKI. So under this settlement agreement there is going to be approximately 67,300 acre-feet of CAP water available for these future Indian water rights settlements. Is this going to be sufficient water to settle those claims that you have just identified?

Mr. RALEY. Senator, I believe that if you aggregate the claims in existence now, it is about 3.3 million acre-feet. If you subtract the claims that would be addressed within this legislation, it leaves the claims outstanding at something like 1.7 million acre-feet. Suffice it the say that, just to make a point, even if the entire Central Arizona Project were dedicated to those claims, which is not being contemplated by anyone, that would not provide adequate water by itself.

We believe that resolution of these future claims, first of all, would not be precluded by this existing legislation, this proposal,

and that it is obvious that for settlement of those other claims water from other than CAP sources would have to be included. Otherwise it is simply impossible to even enter into the ball park of what those claims are. And the quantities and sources are something that would have to be addressed in claim-specific negotiations.

Senator MURKOWSKI. I have additional questions, but we will move on to the other Senators.

Senator Bingaman.

Senator BINGAMAN. Thank you very much.

Let me go back to this issue of the financing mechanism. Do I understand that the administration agrees to the use of the Lower Basin Development Fund to fund this, these settlements in this legislation, or objects to the use of that fund for that purpose?

Mr. RALEY. Senator, the administration is reviewing that concept and is committed to finding a concept that works. Whether or not this is the one that will be ultimately acceptable to the administration or not has not been determined.

Senator BINGAMAN. Do you have any alternatives? I mean, when I look around, if you want a firm funding source moving it forward, is there anything else?

Mr. RALEY. The Department of the Interior is not aware of alternative concepts at this time.

Senator BINGAMAN. So this is the only game in town, and you are not opposed to using this Lower Basin Development Fund as the funding source?

Mr. RALEY. Well, Senator, that is currently under review in the Department and the administration and a decision has not been made.

Senator BINGAMAN. Okay. I gather you somewhat answered this in response to Senator Murkowski's question, but do you have an estimate, could you give us a flow line over the next several decades as to what would be going into this Lower Basin Development Fund, what would be coming out, and what would be left? Is that possible? Does somebody have that?

Mr. RALEY. If you will allow me a moment to ask staff. What I do recall is that it is $40 to $50 million annually inflow.

Senator BINGAMAN. Right.

Mr. RALEY. And that the actions contemplated by this legislation could be funded within those amounts, generally speaking. That obviously would be subject to construction schedules.

But let me—if you will allow me a moment, let me see if we have more detailed information.

Senator BINGAMAN. What I would like to see if we could get something that would say, go for the next 40 or 50 years: Here is what will be going in each year during this period and here is what we would expect to be expended from this fund each year in order to implement this legislation.

Mr. RALEY. Senator, if I might offer, given the preciseness of your question, if you will allow us to respond to the committee and to you in writing, I believe that might provide more clarity than a broad answer at this hearing.

Senator BINGAMAN. I think that would be fine. I think that would be useful for us to know what the dollars are as best we un-

derstand them. I understand these are projections, but I think that would be useful.

The Navajo Nation has expressed concern that the CAP water provided for in this bill, S. 437, to address outstanding Indian water claims in Arizona is not sufficient to meet the needs and claims that the Navajo Nation has outside this legislation. I guess the question would be, in your view, is a sufficient amount of water reserved from the CAP to settle these remaining Indian water claims in Arizona, including those of the Navajo Nation? I guess maybe you just responded in one of your earlier answers that sufficient CAP water is not going to be available, but that you are going to look elsewhere to meet those claims of the Navajos and other Indian tribes. Could you clarify that once more for me?

Mr. RALEY. Senator, I was observing that the numbers simply speak for themselves, given that there are roughly. If this settlement were to proceed, 1.7 million acre-feet of claims, that dwarfs the amount of water available from the entire Central Arizona Project and, should the claimed amounts be the reference for settlement it is obvious that water from another source would have to be available.

We believe that the amount set aside in this legislation is an appropriate and adequate amount. But beyond that I really cannot comment, particularly with respect to the Navajo Nation, because, as the Senator knows, those issues now have been raised in Federal court litigation with respect to the Department's responsibility to address those claims and I will have to defer to the Department of Justice with respect to any detailed analysis of what amounts might be implicated under the claims and expectations of the Navajo Nation.

Senator BINGAMAN. Well, I think you can understand the concern I am raising, which is that we have got a lot of unquantified claims out there. We have got claims where we are not sure how much is going to be actually ultimately recognized. And here we are considering legislation that goes ahead and firmly commits a substantial amount of the CAP water for some of those that have been resolved.

We want to be sure that we are not doing something here that precludes us from doing justice to the tribes that are still making claims but have not gotten to the point of actually having the amount specified. So you understand that—I mean, I know that this is sort of ready to go and everybody is anxious to do this piece of it. I am just afraid that by doing this piece of it without knowing what is left to be done, we may be closing off opportunities that we do not want to.

Mr. RALEY. Senator, we share your concern and that, as noted in my opening comments, the trust responsibility of the Department extends to all tribes. The Department believes that the settlement is consistent conceptually with the Department's trust responsibilities and does not preclude the fulfillment of the trust responsibilities of the United States to other tribes. As this committee wrestles with daily, we believe that if we were to wait for all issues to be resolved, which in a perfect world would be preferable, we would wait for decades more; and that this is a responsible and an appropriate piece to proceed with at this time and will

provide a foundation for moving forward with both tribal and non-tribal issues in Arizona and New Mexico.

Senator BINGAMAN. Let me ask about one other issue. Section 106(b) of the bill reclassifies as non-reimbursable $73.5 million of debt that is owed to the United States for the construction of irrigation delivery systems for agricultural water users. What value—what is the Government receiving in the settlement in return for waiving the repayment requirement for that $73.5 million and what is the present value of the $73.5 million repayment that it is proposed that we waive here?

Mr. RALEY. Senator, with respect to the present value, if you will allow we will include that amount in the written response that we will provide you.

With respect to the question, which we care very much about, as to what is the value to the United States of this, the value is water, in that this settlement is predicated on a final allocation of CAP water that allows the needs of multiple entities to be met and involves in some cases entities receiving less water than they had originally anticipated. So we believe that there is——

Senator BINGAMAN. So you think these agricultural water users had a valid claim to water that they are now giving up in return for the Government foregoing that repayment?

Mr. RALEY. Senator, we believe that there is value to the United States associated with the agreements by agricultural water uses to participate in this settlement.

Senator BINGAMAN. And this is the price to get them to participate in the settlement?

Mr. RALEY. Yes, sir.

Senator BINGAMAN. That is all I have right now.

Senator MURKOWSKI. Thank you.

Senator Kyl.

Senator KYL. Thank you, Madam Chairman. I will not ask a question unless either Ms. Martin or Mr. Raley would like to comment on what I have to say.

Let me just say first of all that I very much appreciate the testimony and in particular, the notion that there is an opportunity here and this opportunity may not present itself in the future; and that I would expand on that by saying that, in response to the very good questions that have been raised by both you, Madam Chairman, and you, Senator Bingaman, that there is a capability built into this settlement to assist all of the tribes that have outstanding claims, even though some of the tribes, like the Navajo and Hopi for example, are not in the Gila Basin.

In other words, the Central Arizona Project brings CAP water to the central part of the State. Those are the taxpayers that actually pay back the cost of the CAP. But through exchange mechanisms we can set some additional water aside and by various parties doing exchanges actually use some of that water to satisfy obligations to the Navajo and the Hopi, and that is how they can be assisted by this fund.

About 50 percent of the CAP water will go to Indians as a result of this settlement. Back when it was being debated—I do not know if Senator Akaka or Senator—I think Senator Domenici would probably remember and Senator Inouye for sure. But if anybody

had said back then that even 20 percent of the water of the CAP was going to go to Indian use, they would have said no, that is not the way it is.

Now 50 percent—it is 49 percent roughly, but almost 50 percent—of the water is going to go to Indian tribes. Obviously, some people had to give up water in order to accomplish that, including these agricultural users. The Department is being careful not to characterize the validity of the claims because there is litigation, obviously, as to that. But those farmers think they have a pretty good claim, and they have committed a lot of money, borrowed it. That is the so-called 9-D debt. Obviously, if they are going to give up some of their water and no longer use the facilities that have been constructed, they cannot be asked to continue to pay off those loans. So that is the value of the U.S. Government there.

I would just make a final comment here. That is that I think it is appropriate for us to be focusing on the issues that remain. I wish we could spend all of our time just talking about all of the things the parties have gotten together on and all of the benefits of this. I think everybody here is sophisticated enough to know that we would not be here if there were not a lot of those benefits and that the remaining work is to focus on the remaining issues, and that is totally appropriate.

Therefore, Senator Bingaman, your question and the comments that Senator Murkowski read from Senator Domenici, we are fully prepared to work on the issues that are of importance to New Mexico and understand that those issues need to be resolved.

We have been working with the San Carlos Apache Tribe more recently about the possibility of an agreement with that tribe that would bring them into the settlement, and I am hopeful and I think I can say optimistic, but I better reserve that for the moment, but at least hopeful, that that will be done by the time we get ready to actually move the legislation on to the President.

So the other issues that remain do need to be addressed. They can be addressed within the appropriate time frame. We are totally committed to getting them addressed. But as with all of these opportunities, and going back to the original comment about the window of opportunity, there is an importance in getting the process started.

That is why I am so appreciative of Senator Domenici allowing this hearing to be held even though the issues regarding New Mexico have not yet been resolved, because it is another step forward in the process here. We understand that the journey cannot be completed without a resolution of those issues, but there is a timing factor here, and if we can get the process started now I would think we can have those issues resolved by the time we are done.

Senator Bingaman, you also asked a very key question about the payments into the fund and out of the fund. There is a lot of data about that, which we will supply to you. We all need to know that, and we have that. It is somewhat notional because, as Mr. Raley said, we are not exactly sure exactly what the timing on these various contracts is, and that will dictate, to some extent, how certain monies are paid out.

The Bureau of Reclamation has been working very closely with the Gila River Indian Community about those contract issues, but

to the extent that that information can be nailed down, it is there, and it will be provided to the committee. Actually, it is very specific, and there are some really interesting and complex charts that try to explain it further. So we will, for sure, have that information as well.

Those are comments that I wanted to make, and I appreciate the indulgence of my colleagues.

Senator MURKOWSKI. Thank you.

Senator Akaka, questions?

Senator AKAKA. Thank you very much, Madam Chairman.

Ms. Martin, concerns have been raised that the water allocations from the Central Arizona Project for Indian tribes are substantially lower than the water allocations for non-Indian communities. Do you believe the allocation of 47 percent to tribes and 53 percent to non-Indian users fulfills the Federal Government's trust obligations to these tribes? And if not, what is your recommendation?

Ms. MARTIN. Well, under I think previous agreements the actual allocation for tribes was lower. So I do believe that this increase, this 47 percent allocation, is an improvement and that it does meet the trust responsibility to Indian tribes.

Senator AKAKA. Mr. Raley, as we will hear from other panelists, there are concerns about the future water supply, both for agricultural as well as municipal use. As non-Indian communities continue to expand and water demands increase, do you believe that the water allocations in the bill will meet the future demands of both Indian and non-Indian countries?

Mr. RALEY. Madam Chair, Senator, the Department believes that the allocations are fair and appropriate. However, it is clear that all demands for water for all uses cannot be met from the Central Arizona Project, and that reality is the basis for the Secretary's Water 2025 initiative, which points out that if we are to meet the water needs of the West for all sectors—ag, urban, tribal, environmental, and recreation—we need to proceed with tools we know that can work and stretch the existing water supplies further, because if there is one thing the Department of the Interior cannot do that is make it rain or snow. So we are left with the task of managing as stewards collectively with our State and tribal partners this most vital resource.

Senator AKAKA. I was interested in a comment you made in your statement about the Navajo Nation's water claims and mentioned that you would want to talk with the Department of Justice in order to understand future demands on the CAP. Does S. 437 have mechanisms in place to address future demands and, if so, what mechanisms are there?

Mr. RALEY. Senator, as Senator Kyl has observed, this legislation has the capacity to be consistent with and to enable additional settlements. We also believe that this legislation does not preclude or prohibit or impair future settlements, which is the reason that we are able to testify here today that this legislation is consistent with and would not result in the Department being unable to fulfill its trust responsibilities, noting that we very much would like to see the interests of the San Carlos Apache Tribe dealt with as being an in-basin user in the Gila Basin that inevitably must be dealt with.

Senator AKAKA. Thank you very much.

Madam Chairman, thank you very much, and I look forward to working with Senator Kyl on this bill. Thank you.

Senator MURKOWSKI. Thank you.

There were a couple of other questions that I had. I know Senator Domenici had a question. I am going to be submitting mine to you for a written response as well as Senator Domenici's. Senator Bingaman, do you have an additional question?

Senator BINGAMAN. I did want to. Thank you, Madam Chair. Let me ask one additional question.

I notice on page 10 of your testimony you have an interesting paragraph there and I just wanted to ask you to elaborate on it. You say: "S. 437 also includes significant waivers of the United States' ability to enforce environmental statutes related to the water quality in the Gila River Basin. The settling parties seek to limit their exposure to environmental liability."

Then you go on to say: "This could restrict the ability of the Federal Government to clean up the most contaminated waste sites in the Gila River Basin. As drafted, the legislation could also be interpreted to provide a waiver for future claims under certain environmental statutes, including those under the Superfund authority."

I gather your point there is that the administration opposes those provisions in the proposed legislation?

Mr. RALEY. Senator, we believe that additional work is required to address these issues. The Department of Justice is in the lead on these issues and we are comfortable that they can be resolved so that we can fully support those aspects of this legislation.

Senator BINGAMAN. So you think some change needs to be made, but you are not prepared to tell us what it is?

Mr. RALEY. The answer is yes and yes.

Senator BINGAMAN. That is all I have, Madam Chair.

Senator MURKOWSKI. Thank you.

Senator Kyl, anything further?

Senator KYL. Thank you, Madam Chairman. I would just note that my understanding is that some of the people who are here this week to testify and to be here have also been in consultation with the Department of Justice on precisely that issue and they report that they are making progress on resolving that issue. It is another one of the issues that has to be resolved, but the parties believe can be resolved.

Senator MURKOWSKI. With that, thank you both very much, Mr. Raley, Ms. Martin. We appreciate your being here this morning.

Mr. RALEY. Thank you, Madam Chair.

Senator MURKOWSKI. I would now like to invite up the members of the second panel who will be providing testimony here this morning: Mr. Richard Narcia, the governor of Gila River Indian Community; Ms. Vivian Juan-Saunders, chairwoman of the Tohono O'odham Nation; Mr. Joe Shirley, Jr., State of the Navajo Nation; and Ms. Kathy Kitcheyan, the tribal chairwoman for the San Carlos Apache Tribe.

Senator KYL. Madam Chairman, as they are being seated might I be permitted to just make one comment?

Senator MURKOWSKI. Please, go ahead, Senator Kyl.

Senator KYL. This is a remarkable panel that you have before you. They are all representatives of—we share representation of constituents in Arizona. I just wanted to express my appreciation for all of them being here. I could discuss in great detail the cooperation that we have had over the years on many matters, and it has been a real pleasure for me to get to work with them, and I just very much appreciate their participation here today.

Senator MURKOWSKI. Thank you.

And a welcome to all of you this morning. I would remind you that, in the interest of time, if you could attempt to keep your testimony to the 5 minutes, we would appreciate it. We understand this is very complex. There is a lot of information to provide and a great many years have gone before us, so it is difficult to keep your comments limited. But we do appreciate that.

Let us begin on this end, please, with Governor Narcia. Good morning and welcome.

STATEMENT OF RICHARD P. NARCIA, GOVERNOR, GILA RIVER INDIAN COMMUNITY, SACATON, AZ

Mr. NARCIA. Good morning. Thank you, Chairman Murkowski, Senator Bingaman, Chairman Campbell, and Vice Chairman Inouye, and members of the Energy and Natural Resources Committee and the Committee on Indian Affairs.

I am Richard Narcia, governor for the Gila River Indian Community, and I appreciate the opportunity to share with you the community's strong support of the Arizona Water Settlement Act. I would also like to take this opportunity to thank you, Senator Kyl, for your hard work and leadership in sponsoring this important legislation; also to thank you, Senator McCain, for your steadfast support of our community; as well as Senator Johnson for his commitment and support to our settlement.

This settlement is a monumental achievement for our community and enjoys the unanimous support of our council, nine of whom are with me today and are listed in my written testimony.

The Gila River Indian Community was formally established by executive order in 1859. The community is comprised of the Pima's, or the Akimel O'odham, and the Pee Posh, or the Maricopa, people. We are the largest community in the metropolitan Phoenix area. Our reservation encompasses nearly 600 square miles, with an enrolled population of over 19,000. Our history in the Phoenix Valley dates back thousands of years. Some of the most ancient agricultural irrigation systems in the world were built by our ancestors and can be found throughout metropolitan Phoenix. Agriculture was the mainstay of our community until recent times.

We are the Akimel O'odham, the River People, and, as I stated, we have resided in the Gila River Valley of central Arizona for centuries. We are direct ancestors of the ancient Hohokum, who farmed the Gila River Valley since at least 300 A.D., developing hundreds of miles of irrigation canals to supply water for crops such as corn, squash, lima beans, tobacco, and cotton.

Together, the Akimel O'odham and the Pee Posh thrived on what the Gila River provided—a plentiful source of food, water for irrigation, and a way of life for all our people. The river was our source of life, the center of our economic and social environment. It pro-

vided for all the community's needs and as a result the River People were among the most prosperous, self-sufficient communities, Indian and non-Indian, in the entire Phoenix Valley. As settlers moved to the Phoenix Valley, our community adapted and assisted the new settlers by providing food and protection. members of our community formed a component of the first Arizona Territorial Guard.

This all changed in the late 19th century. New settlements were established upstream from our tribal lands, including farmers, industry, and other landowners, who began to divert water from the Gila River. As the turn of the century approached, the steady flow of the Gila River across our tribal lands diminished. Today the Gila River does not flow through our tribal lands. It is now a dry river bed winding through the desert. The loss of the Gila River has resulted in great poverty to many members of our community and has led to changes in our diet that has resulted in the highest per capita incidence of diabetes of any community in the world.

In 1989, our community and the U.S. Government initiated water settlement negotiations to address the great uncertainty about the allocation and the dependability of water supplies to our reservation and to the more than 3 million people and businesses of Maricopa, Pinal, Pima, Graham, and Gila Counties in central Arizona. Nearly 14 years later, we have reached a comprehensive settlement of our community's water rights claims and the allocation and priority of water supplies among the major water users of central Arizona.

The benefits of this settlement for our community are many. Most importantly, it will guarantee a dependable water supply to our lands. In total, we will have an annual entitlement of 653,500 acre-feet, most of which will come from the Central Arizona Project, which delivers approximately 1.5 million acre-feet of Colorado River water annually to central Arizona. While this amount is only a fraction of the water which we are legally entitled to, it does provide our community with a new source of water to replace the Gila River water that was lost.

The settlement agreement also will ensure us construction and maintenance of a distribution system that will be needed to allow delivery of the water to the reservation. Together, the settlement water and distribution infrastructure will enable our community members to farm tribal and allotted lands as well as provide them an opportunity to escape poverty and to participate meaningfully in the economy of the region. While there is little chance that we can recapture the prosperity of our ancestors, the settlement agreement will enable more tribal members to participate in our ancestors' way of life.

As a result of this settlement, the community will achieve a separate peace with non-Indian parties throughout Arizona. We are convinced that this is the right path for the community. There is no question that our presence may be missed by other tribes who will still be involved in ongoing litigation. However, the community has deliberated on this at length and made its choice.

This is not to say that our choice was easy. To achieve agreement we, like all to other parties in this settlement, have had to make

many compromises. But we view these compromises each very carefully and considered and approved by our council.

The settlement agreement encompassed in the Arizona water settlement is the top priority of the Gila River Indian Community. We have expended enormous amounts of time and resources to reach this agreement with nearly every major water user in central Arizona. While our community and each party to this agreement will make sacrifices to fulfill this settlement, we will do so in exchange for dependable supplies of renewable water and a more certain economic future.

I want to again express my appreciation to appear before this committee today and I would like to make a comment. After having reviewed some of the testimonials that will be heard today, I just want to reflect on the fact that this settlement has been very transparent. That was the direction that I gave when I became Governor to our water negotiation team and to our negotiators, that we need to be able to address any issue, any concern of anyone or any entity in our negotiations, that they had a seat at the table.

Now, recognizing whether or not those entities or people wanted to have a part of this, that was up to them. But the fact remains and for the record, our settlement has been very open and we believe that the negotiations and agreement have reflected that. I am sure that we will continue to work with anyone who has concerns about this settlement.

[The prepared statement of Mr. Narcia follows:]

PREPARED STATEMENT OF RICHARD P. NARCIA, GOVERNOR, GILA RIVER INDIAN COMMUNITY, SACATON, AZ

Thank you Chairman Domenici, Senator Bingaman, Chairman Campbell and Vice-Chairman Inouye, and members of the Energy and Natural Resources Committee and the Committee on Indian Affairs. I am Richard Narcia, Governor of the Gila River Indian Community. I appreciate this opportunity to share with you the Community's strong support for the Arizona Water Settlements Act (S. 437). I would also like to take this opportunity to particularly thank you, Senator Kyl, for your hard work and leadership in sponsoring this important legislation. I would also like to thank Senator McCain for his steadfast support of the Community in accomplishing this settlement, as well as Senator Johnson for his commitment and dedication to issues affecting tribes throughout the country and in particular his support for our settlement.

This settlement is a monumental achievement for our Community and enjoys the unanimous support of our Council, ten of whom are here with me today. For the record, I would like to acknowledge each of them: Wally Jones, Eugene Blackwater, Jennifer Allison-Ray, Bernell Allison, Sr., Cecil Lewis, Gordon Santos, Gerald Sunna, Christopher Soke, Sr., Jonathan Thomas, and Harry Cruye. Finally, I would also like to recognize and thank the members of the Community Water Negotiation Team for their hard work in making this a reality, including Council members who are also members of the Team—Harry Cruye, Jonathan Thomas, and Chris Soke, Dana Norris, the former Director of the Office of Water Rights, Cecil Antone, the current Director of the Office of Water Rights, Rod Lewis, the General Counsel for the Community, Ardell Ruiz, Harlan Bohnee, and Lee Thompson.

INTRODUCTION

By way of introduction, the Gila River Indian Community was formally established by Executive Order in 1859. The Community is comprised of the Akimel O'odham (Pima) and the Pee Posh (Maricopa) people. We are the largest Indian Community in the Phoenix metropolitan area, with a Reservation encompassing nearly 600 square miles and with an enrolled population of over 19,000. We have a long history in the Phoenix Valley, dating back thousands of years. Some of the most ancient agricultural irrigation systems in the world were built by our ancestors

and can be found throughout the Phoenix metropolitan area. Agriculture was the mainstay of our Community until very recent times.

The Arizona Water Settlements Act will help reestablish our Community's access to renewable sources of water as compensation for the Gila River water taken from the Tribe beginning over a century ago. The return of dependable sources of water will enable more members of our Community to participate in our agricultural heritage and enjoy a better way of life.

The Arizona Water Settlements Act encompasses the largest Indian water claims settlement in U.S. history. This agreement has been negotiated over the last fourteen years by nearly all major water users in central Arizona, including representatives of our Community, state, local and other tribal governments, farming and industry. The agreement establishes and prioritizes the allocation of water among these parties. It concludes longstanding litigation that has been expensive and disruptive to our Community and to others in central Arizona, preventing us from planning future growth and impeding steps to achieve economic stability and political harmony in the region.

The Arizona Water Settlements Act also provides a mechanism for funding future Indian water rights settlements in Arizona and the construction of new water distributions systems for Indian tribes in the Phoenix Valley as required under existing water settlement agreements. Thus, it provides major benefits for other Arizona tribes, both those that have already settled their water claims and are awaiting the construction of their water systems, as well as those that are seeking to settle their claims at some point in the future.

OUR HISTORY

To fully appreciate the importance of the Arizona Water Settlements Act to our Community and its future, I would like to briefly review our history and the central role of water to our culture and economic prosperity.

We are the Akimel O'odham, the *People of the River*. We have resided in the Gila River Valley of central Arizona for centuries. The direct ancestors of the Akimel O'odham, the Ancient Hohokum, farmed in the Gila River Valley since at least 300 A.D., developing hundreds of miles of irrigation canals to supply water for crops such as maize, squash, lima beans, tobacco and cotton.

Together, the Akimel O'odham and Pee Posh thrived on what the Gila River provided—a plentiful source of food for tribal members, water for irrigation and a way of life for all the Tribes' people. The River was our breadbasket and the center of our economic and social life. It provided for all the Community's needs, and as a result, the People of the River were among the most prosperous, self-sufficient communities, Indian and non-Indian, in the entire Phoenix Valley. As settlers moved to the Phoenix Valley, our Community adapted to and assisted the new settlers by providing food and protection. Members of the Community formed a component of the first Arizona Territorial Guard.

This all changed in late 19th century. New settlements were established upstream from our Tribal lands, including farmers, industry, and other landowners, who began to divert water from the Gila River. As the turn-of-the-century approached, the steady flow of the Gila River across our tribal lands diminished, and with this dependable water source went our vast farmlands and our ability to sustain all Members of our Community.

Today, the Gila River does not flow through our Tribal lands. It is now a dry river bed winding through the desert. The loss of the Gila River has resulted in great poverty to many Members of our Community, and has led to changes in our diet that have resulted in the highest per-capita incidence of diabetes of any community in the world.

BACKGROUND TO ARIZONA WATER SETTLEMENTS ACT

Our struggle to regain the Gila River began in the early part of the last century. In 1924, Congress authorized construction of the Coolidge Dam as the primary feature of a new irrigation project-called the San Carlos Irrigation Project—that would provide irrigation for our Reservation. The 1924 Act was intended to address our loss of Gila River water and, in so doing, fulfill the trust obligation of the United States to our Community.

The 1924 was also to create a non-Indian component to this irrigation project. Unfortunately, although the 1924 Act provided that our component of this project was to be built before the non-Indian portion, our portion was never completed, and what was built was never adequately engineered or maintained. Thus, although the San Carlos Irrigation Project was intended to create an irrigation project for 50,000

of the irrigable acres on our Reservation, it never served more than 30,000 acres and today serves just over 15,000 acres.

In 1925, citing the 1924 Act, the United States sued water users upstream of our Community in order to reestablish existing rights of the Community in the Gila River. Unfortunately, the U.S. government, in all candor, did not do a very good job in making its case on our behalf, which resulted in greater frustration and increased federal liability to our Community. Our frustration was fed by the fact that when the Community sought to intervene itself in this litigation, the United States actually opposed our intervention. As a result, we were prevented then from actually participating in litigation that would set the framework for our struggle to protect our water rights up to the present day.

Ten years later, in 1935, this litigation ended in a settlement and consent decree—called the *1935 Globe Equity Decree*—which recognized the Community's rights to 300,000 acre-feet of Gila River water each year. This was far less water than our people had access to for centuries prior to the settlement. Moreover, to this day, we have yet to receive much more than 100,000 acre-feet annually of the amount decreed in 1935. Thus, not only did the Community not receive recognition of all its water rights in 1935, it has not even received from the Gila River that to which the Globe Equity Court decreed it was entitled.

As a result, our Community has been forced to continue its struggle to vindicate its claims to water through litigation. First, in 1982, we began an effort in federal district court to enforce the 1935 Decree against upstream Gila River diverters. Second, we filed the single largest claim for water rights in the Gila River Adjudication, a separate State court proceeding begun in the mid-1970s to determine and establish the priority of water rights in the Gila River system and its tributaries. In this State court adjudication, we are claiming approximately 1.2 million acre-feet of water annually from these water systems and seeking judicial recognition that our water rights supersede those of all other non-Indian users.

Absent the comprehensive water settlement contained in the Arizona Water Settlements Act, we will have no choice but to continue to pursue our water rights through this litigation. We will also have to explore more actively any action we might have against the federal government for its failure to adequately protect and develop our water resources as required by its trust responsibility to the Community and its statutory obligations under the 1924 Act.

THE SETTLEMENT AGREEMENT AND ARIZONA WATER SETTLEMENTS ACT

In 1989, our Community and the United States Government initiated water settlement negotiations to address the great uncertainty about the allocation and dependability of water supplies to our Reservation and to the more than three million residents and businesses of Maricopa, Pinal, Pima, Graham, and Gila Counties in central Arizona. Nearly 14 years later, we have reached a comprehensive settlement of our Community's water rights claims and the allocation and priority of water supplies among the major water users in central Arizona. Our settlement is in many ways unique:

- One, it is the largest settlement of Indian water rights in U.S. history, at least to this date.
- Two, it involves thirty-five separate parties, both Indian and non-Indian, most of which have required separate negotiations and agreements to resolve the specific issues raised between them and the Community. It is a very large bundle of compromises, each of which was thrashed out with the full consideration of its implications and importance in the overall deal. Its very size precludes the possibility of it being perfect, but the Community recognizes that it would be unrealistic to expect perfection in a settlement of this size and scope. I can assure the Committees that in each instance in which the Community has compromised, it has done so with due deliberation by both the Water Negotiation Team and, when necessary, the prior approval of the Council.
- Three, our settlement is part of a more comprehensive settlement of repayment issues between the United States and the Central Arizona Water Conservation District. This settlement establishes a unique framework for resolving funding and water supply issues not just for our settlement and that of the Tohono O'odham Nation, but also Indian water rights settlements already negotiated and approved in the past, and those to come in the future. This settlement component is critical to our settlement and without it, the settlement will not work.
- Four, although most Indian water settlements affect only a single State, ours includes water users in New Mexico as well. A number of the parties with whom we are settling are located in the State of New Mexico in the Virden Valley. Moreover, we have worked closely with the State of New Mexico to ensure

our settlement does not adversely affect the exchange rights that the State of New Mexico obtained in the 1968 Colorado River Basin Project Act. We are now actively exploring with the State of New Mexico, along with all the other affected parties in the State of Arizona, means of potentially implementing these exchange rights. If other New Mexico concerns or interests are raised, we will, of course, do what we can to help to address them.

- Fifth, given the complexity of interests addressed in our settlement, and the very large number of parties involved, as well as our geographic location in close proximity to major metropolitan areas in the Phoenix area, the Community has been obliged to serve as the primary coordinator of all such negotiations and to work out issues between parties as well as our own. This has been a major undertaking on the part of the Community, but one that we believe is well worth the effort. As we approach Congress for consideration of this major piece of legislation, we can safely say that every essential issue that can be resolved in the context of one individual Tribe's settlement has been resolved.
- Sixth, the Community has actively sought out the views of other parties potentially affected by this settlement, particularly other tribes, in an effort to explain our settlement and alleviate any concerns that we can. I have personally reached out to all other tribal leaders in the State in this regard. I cannot guarantee that we completely agreed with their concerns, but I know that we have made a fair and reasonable effort to do so. My own experience with other Indian water settlements in Arizona that were considered without any consultation or consideration of other tribes' concerns is a major motivation for me in this regard.

The benefits of this settlement for our Community are many. Most importantly, it will guarantee a dependable supply of water to our lands. In total, we will have an annual entitlement of 653,500 acre-feet of water under the agreement. Most of this will come from the Central Arizona Project, which delivers approximately 1.5 million acre-feet of Colorado River water each year to central Arizona. While this amount is only a fraction of the water to which we are legally entitled, it does provide our Community with new water sources to replace some of the Gila River water we have lost—our Community has a strong desire for actually deliverable water rather than rights to water that is not enforced.

The settlement agreement also will ensure construction and maintenance of the distribution systems that will be needed to allow delivery of water to the Reservation. Together, the settlement water and distribution infrastructure will enable more of our Community Members to farm Tribal lands and Allotted lands, as well as provide them an opportunity to escape poverty and to participate more meaningfully in the economy of the region. While there is little chance that we can recapture the past prosperity of our ancestors, the settlement agreement will enable more Tribal members to participate in our ancestors' way of life.

I would note that all funds that the Community is to receive as part of this settlement are being used solely for the development of a viable water delivery system for our farmers. One portion of the funds that the Community will receive from this settlement is to be used to rehabilitate and finally build out the long-awaited San Carlos Irrigation Project on our Reservation. Although authorized in 1924 and intended by Congress to be built prior to any non-Indian portions of that project, it never was completed and what was built has fallen into substantial disrepair.

The Community has agreed to use most of the funds it receives for that worthwhile end. The remaining balance is intended to assist the Community in making the CAP water it receives in lieu of its rights to the natural waters of the Gila River affordable for its Members and Allottees. The Community has committed to supplement the funds it receives from the settlement for this purpose.

As a result of this settlement, the Community will also achieve a separate peace with non-Indian parties throughout Arizona. The Community has struggled for this peace for many years, many times working hand in hand with other Arizona Indian Tribes, such as the San Carlos Apache Tribe. We are convinced that this is the right path for the Community at this time. There is no question that our presence may be missed by other tribes who are still involved in ongoing litigation. However, the Community has deliberated on this at length and made its choice.

This is not to say that our choice was easy. To achieve agreement, we, like all other parties to this settlement, have had to make many compromises along the way. Some were harder than others, but each was carefully considered and approved by our Council. We view the package as developed as one that is worthy of all our support.

The Arizona Water Settlements Act contains numerous benefits for Arizona. It will eliminate uncertainty among Indian communities, state and local government

leaders, industry, farmers and other citizens, concerning future water use in central Arizona. This will enable long-term water planning to proceed for all concerned. The Act will help settle drawn-out and costly litigation of water rights and damage claims, enabling all parties to the settlement to refocus on future economic planning and growth.

The Act also will help ensure that existing water use in central Arizona and upstream of our Reservation on the Gila River will not be disrupted or displaced by our claims. Through lease and exchange agreements with the surrounding cities, the settlement provides for unique new opportunities for the Community and the surrounding municipalities to cooperate in their water use and planning. Finally, the Arizona Water Settlements Act, more than any federal government action since this water dispute began over a hundred years ago, will help satisfy the United States' trust responsibility to our Community and other Indian tribes. It will ensure dependable renewable water supplies and delivery to Tribal lands, as partial compensation for water taken from the Community, its Members and Allottees for over a century.

CONCLUSION

The settlement agreement encompassed in the Arizona Water Settlements Act is the top priority of the Gila River Indian Community. We have expended enormous amounts of time and resources to reach this agreement with nearly every major water user in central Arizona. While our Community, and each party to this agreement, will make sacrifices to consecrate this settlement, we will do so in exchange for dependable supplies of renewable water and a more certain economic future. For our Community, this settlement offers an opportunity for more of our Tribal members to partake in the rich agricultural heritage of our ancestors, the Akimel O'odham and Pee Posh.

I again want to express my appreciation for the opportunity to appear before the Committees today to share our views on this historic legislation. We are very hopeful that the Committees will favorably consider this legislation and that it will be enacted during this Congress so that our people and so many other stakeholders in Central Arizona—may finally begin to realize the benefits that will flow from this long overdue water settlement.

Thank you.

Senator MURKOWSKI. Thank you, Mr. Narcia.

Mr. NARCIA. Thank you.

Senator MURKOWSKI. We appreciate it.

Mr. Shirley.

STATEMENT OF JOE SHIRLEY, JR., PRESIDENT, NAVAJO NATION, WINDOW ROCK, AZ, ACCOMPANIED BY STANLEY POLLACK, ATTORNEY

Mr. SHIRLEY. Thank you very much, Madam Chair Murkowski, Senator Kyl, Senator Bingaman. Thank you for the opportunity to be heard.

We have written testimony. I just want to add a few more to that written testimony.

Senator MURKOWSKI. Mr. Shirley, can you make sure that your button is pressed on your microphone there, right at the base there.

Mr. SHIRLEY. Okay.

Senator MURKOWSKI. See how that works.

Mr. SHIRLEY. Okay. Can you hear me?

Senator MURKOWSKI. That is good, thank you.

Mr. SHIRLEY. Again, thank you, Madam Chair Murkowski, Senator Kyl, Senator Bingaman, and the rest of the committees. I want to express a great appreciation to the efforts put forward by Senator Kyl in Congress to have devoted to addressing, what time was devoted to addressing the water issues in the State of Arizona and

also water issues related to Native Americans, including the Navajo Nation in the State of Arizona.

The Navajo people understand the importance of water, particularly since almost half the Navajo homes lack running water. These Navajo families must haul water from distant water sources in order to have a reliable supply of domestic water. Thus, the Navajo people do not take water for granted and support the efforts of the Gila River Indian Community to settle their water rights claims.

However, there are various aspects of S. 437 that are troubling to the Navajo Nation. Our concerns are identified in the written testimony submitted by the Navajo Nation. The most critical issue arises out of section 104 of the proposed legislation. That section ties the hands of the Secretary by requiring a water rights settlement approved by the Congress as a precondition to the reallocation of Central Arizona Project water. The Navajo Nation needs a supply of the Central Arizona Project water today. The community of Window Rock needs a supplemental supply of drinking water. Although that community is located in Arizona, the best source of potable water for Window Rock is from the San Juan River in New Mexico.

The Navajo Nation is close to a final settlement of its water rights to the San Juan River in New Mexico. The centerpiece of that settlement is the proposed Navajo-Gallup Water Supply Project that would bring potable water to the city of Gallup, New Mexico, and to Navajo communities in western New Mexico and eastern Arizona. The Navajo Nation needs 6400 acre-feet of Arizona water for that project and for the settlement with New Mexico. We hope to introduce settlement legislation early next year that would authorize this project.

We cannot afford to wait for a settlement of our claims in Arizona in order for the New Mexico settlement to move forward. In short, section 104 of S. 437 makes it impossible for the Secretary to allocate much-needed water to Window Rock. The residents of Window Rock cannot afford to wait for a settlement of the Navajo Nation's water rights claims in Arizona as the precondition to obtaining a much-needed drinking water supply.

We are presently engaged in discussions with the State of Arizona and the Gila River Indian Community concerning this issue and hope that we can find a win-win solution for the Navajo Nation and the community. I have our water rights attorney, Mr. Stanley Pollack, to answer any of your questions.

Thank you.

[The prepared statement of Mr. Shirley follows:]

PREPARED STATEMENT OF JOE SHIRLEY, JR., PRESIDENT, NAVAJO NATION, WINDOW ROCK, AZ

Chairman Murkowski, Chairman Campbell, and members of the committee, I am President Joe Shirley of the Navajo Nation. Thank you for the opportunity to provide testimony before the Committee regarding the Navajo Nation's views on the proposed settlement for the Gila River Indian Community to be implemented by Senate Bill 437 entitled the "Arizona Water Settlements Act." The proposed settlement will have a tremendous impact on the ability of the United States to supply the Navajo Nation with the water supplies needed to transform the Navajo Reservation into the permanent homeland envisioned when the Reservation was established. I ask the Committee to consider those impacts before recommending the approval of the proposed settlement. Working together, we are confident that the Gila

River settlement can be crafted in way that will not adversely affect the ability of the Navajo Nation to obtain the water supplies so desperately needed on the Navajo Reservation.

Let me begin by saying that the Navajo Nation greatly appreciates the tremendous effort that Senator Kyl and the Congress have devoted to addressing the difficult water issues that confront the State of Arizona. Nothing is more important to the long-term welfare of the State than developing a reliable supply of water to meet the needs of all of the State's citizens, Indian and non-Indian alike. That cannot be done while the water rights of the Indian tribes in the State remain uncertain and cloud the rights of other water users without providing the tribes with the water that they so desperately need. We know that Congress is working hard to find fair and equitable solutions to these difficult problems, and the Navajo Nation wishes to work with you to find a way to address these issues in a way that also meets the long term needs of the Navajo Nation.

The Navajo Nation is not a party to the proposed Gila River agreement nor were we invited to participate in the settlement discussions. Having reviewed S. 437 and the settlement that it would implement, however, it is apparent that there are at least two aspects of the proposed settlement for the Gila River Indian Community that involve water resources that are critical to the Navajo Nation. Both of these issues are matters of utmost importance to the Navajo Nation. In addition, the legislation represents an enormous federal investment in providing water supplies to the State of Arizona. We want to be certain that the present legislation does not preclude devoting further resources towards solving the difficult water supply issues facing the Navajo Nation and its neighbors in rural Arizona and New Mexico.

First, Section 104 of Senate Bill 437 reallocates 197,500 acre-feet per year of agricultural water priority water from the Central Arizona Project ("CAP") for use by Arizona Indian tribes. The bill proposes to transfer to the Gila River Indian Community 102,000 acre-feet of that supply. In addition, Section 104 prohibits the reallocation of any of the supply to an Indian tribe in absence of an Indian water rights settlement that calls for such a reallocation. Moreover, the water in question is "agricultural priority" water which has an extremely limited reliability. Under the provisions Section 105 of the bill, only 17,448 acre-feet of that supply is firmed up so that it can be used for municipal and industrial purposes by the other tribes in Arizona for municipal and industrial purposes. In contrast, Section 104 (b) reallocates 65,647 acre-feet of the far more valuable municipal and industrial priority water to non-Indian towns and cities in Arizona.

The Navajo Nation is deeply concerned about these provisions. While we have worked hard over the last two decades to resolve the Nation's claims to water throughout Arizona and New Mexico, we have outstanding needs for water that cannot be put aside during the years that will be required to achieve an overall settlement of the Nation's claims in those states. We do not believe that water required to meet the everyday needs of tribal members should be held hostage until those settlements are completed. Nor do we believe that the water provided under the provisions of Sections 104 and 105 is adequate to meet the needs—or the outstanding claims—of the Navajo Nation.

For example, it is clear that water from the mainstream of the Colorado River in the Lower Basin is essential to meeting the long term needs of the Navajo Nation on its Reservation, yet the extent of the Nation's mainstream rights has never been seriously addressed, let alone determined. The residents of western portion of the Navajo Reservation lack reliable water supplies and commonly are forced to haul water to meet their everyday needs. As a result of these critical and immediate needs, the Navajo Nation recently brought suit against the Secretary of the Interior to redress the United States' failure to obtain and protect a water supply for the benefit of the Nation from the Lower Basin of the Colorado River. While we recognize that this litigation poses a threat to various Colorado River programs that are critical to all of the basin states, the continued neglect of Navajo interests left us no choice but to proceed with our claims in court.

The Arizona portion of the Navajo-Gallup Project is another example of the efforts underway to address the immediate drinking water needs of the Navajo Nation's members. That project would be the centerpiece of a settlement of the Navajo Nation's water rights claims to the San Juan River rights in New Mexico. The Navajo Nation and the State of New Mexico are close to a final settlement agreement and hope to introduce settlement legislation as early as next year. However, the most troublesome issue is identifying a supply of water for the Navajo-Gallup Project to serve the water-short community of Window Rock in Arizona. A CAP allocation may be necessary for use in Arizona through the Navajo-Gallup Project, but S. 437 would prohibit the Secretary from allocating that water supply in the absence of a water rights settlement in Arizona. The Navajo communities to be served by the project

have an immediate need for additional drinking water and cannot wait for the resolution of the Navajo claims in Arizona.

Ultimately, the nature and extent of the Nation's water rights in Arizona must be resolved if there is to be any certainty with regard to the CAP water supply and for the Indian communities that rely on this supply. If, in fact, the Gila River settlement eliminates or substantially reduces the availability of CAP water for other tribal water rights settlements in Arizona, the United States and the State, in all likelihood, will not have sufficient Colorado River resources to facilitate a Navajo mainstream settlement without taking water away from existing users. In short, we ask that you do not fully obligate CAP allocations in accordance with the terms of this bill, given the Navajo Nation's outstanding needs. The failure to recognize those needs and to obtain and protect a water supply sufficient to meet those needs will only lead to further controversy and disruption in the future.

Second, section 12.14 of the proposed settlement describes a water budget for the Gila River Indian Community that includes a supply of water from Blue Ridge Reservoir, which is located on Clear Creek, a tributary of the Little Colorado River. The need for water from Blue Ridge to provide drinking water for water-short communities in the southern portion of the Navajo Reservation through the Three Canyon Project is now being studied by the Bureau of Reclamation in an ongoing study which Senator Kyl has sponsored. The Navajo Nation has always viewed Blue Ridge Reservoir as the cornerstone of any settlement of the Navajo rights in the Little Colorado River Basin because it is the only practical way to provide renewable surface water supplies to meet the domestic water needs of reservation communities in the vicinity of Leupp. As a result, the suggestion that Blue Ridge Reservoir provide a water supply for the Gila River settlement jeopardizes the contemplated Little Colorado River settlement to the detriment of everyone in the Basin. It is also important to point out that the water supply for Blue Ridge Reservoir is subject to the claims of the Navajo Nation in the Little Colorado River Adjudication, even if a portion of that water were to be provided to the Gila River Indian Community. In the absence of a settlement of the Navajo claims on the Little Colorado River, the Navajo Nation will have no alternative other than to pursue its claims to such water in the ongoing adjudication.

Third, this is a very substantial settlement. It provides the Gila River Indian Community with a water budget of 653,500 acre-feet of water and a hefty amount federal funds. Moreover, it permits the leasing of subsidized settlement water supplies from the community to non-Indian water users in central Arizona with no reimbursement to the United States for the capital costs of CAP. Far more troubling, however, are the benefits extended to non-Indian water users by the settlement. For example, Section 106(b) in conjunction with Section 107 appears to render non-reimbursable $73,561,337 of debt incurred by CAP agricultural water users in Arizona under Section 9(d) of the Act of August 4, 1939. We fail to see the justification for such waivers. Moreover, we understand that other non-Indian water users are waiting in the wings to take advantage of the unique and expensive funding mechanisms provided by the legislation. Whatever the merits of the funding mechanisms in the bill, the benefits of those procedures should be reserved for Indian water right settlements or the provision of much needed water supplies to tribal communities.

In closing, the Navajo Nation understands the significance of proposed Gila River settlement for the Gila River Indian Community and the State of Arizona. Unfortunately, the settlement as currently proposed jeopardizes the ability to resolve the critical issues facing Arizona, the United States and the Navajo Nation. The Navajo Nation wants to work with Congress, Senator Kyl, the State of Arizona and the other parties to the proposed Gila River settlement to address these concerns so that the proposed settlement may move forward promptly. Thank you for the opportunity to testify on this matter of great importance to the Navajo Nation.

Senator MURKOWSKI. Thank you, Mr. Shirley. Thank you for being here this morning.

Ms. Juan-Saunders, welcome.

STATEMENT OF VIVIAN JUAN-SAUNDERS, CHAIRWOMAN, TOHONO O'ODHAM NATION, SELLS, AZ

Ms. JUAN-SAUNDERS. Thank you. Thank you, Madam Chair, Senator Murkowski, Senator Kyl, and Senator Bingaman and members and staff members from the Senate Committee on Indian Affairs.

My name is Vivian Juan-Saunders. I am the chairwoman of the Tohono O'odham Nation. We are located in southern Arizona, with

a land base of 2.8 million acres and an enrolled membership of 28,000. I would like to thank you for the opportunity to speak on the Arizona Water Settlement Act of 2003. I would first of all like to express our appreciation to Senator Kyl, who co-sponsored the introduction of the Settlement Act and was instrumental in securing a resolution among multiple parties with varied interests, as well as our appreciation to other members of the Arizona delegation who expressed their support.

Madam Chair, in your opening remarks you used the term "monumental" and I would like to share with you the extraordinary efforts of the negotiating team in reaching a consensus on the issues which enabled the introduction of amendments to the Tohono O'odham Nation's 1982 water settlement. The negotiating team included representatives of the Tohono O'odham Nation, the nation's legislative council, the San Xavier District, the Schuk Toak District—the Tohono O'odham Nation is comprised of 11 political districts; San Xavier and Schuk Toak are 2 of the 11 districts—the San Xavier allottees, the San Xavier Cooperative Farm, the State of Arizona, the city of Tucson, Asarco Incorporated, which is a copper mine, and Farmers Investment Company. Officials from the Department of the Interior also actively participated in the negotiations.

The written testimony that we submitted includes a detailed summary of the Southern Arizona Water Rights Settlement Act, as well as the cost and appropriation items related to the amendments.

I would like to focus on the benefits which will be realized by water users in the Tucson Management Area. First of all, what has historically been widespread uncertainty regarding the rights of water users in the Tucson Management Area will be transformed into certainty regarding these rights.

Receipt of several significant benefits under the Southern Arizona Water Rights Settlement Act was conditioned on final dismissal of the underlying water litigation, including the annual delivery of 28,200 acre-feet of water within the San Xavier and eastern Schuk Toak Districts of the nation, and collection of damages by the Nation for failure of the United States to deliver water to the districts. In addition, the agreement by the Tohono O'odham Nation to waive and release past and future water claims and past injuries to water rights only takes effect on final dismissal of the *United States* v. *Tucson*. By agreement among the parties to the amendments, this lawsuit will be dismissed with prejudice. Under the amendments, the waiver and release of claims also extends to future injuries to water rights.

The parties' commitment to dismiss the lawsuit was predicated on resolving longstanding differences of opinion between the Tohono O'odham Nation, the San Xavier District, and the San Xavier allottees regarding the division of water and financial benefits under the Southern Arizona Water Rights Settlement Act. Listed in our testimony you will find the disputes and how they were settled.

Number four, a reliable source of funding is critical to the timely implementation of the amendments. The interest on the cooperative fund established under SAWRSA is inadequate to fund the

costs required to fulfill the obligations of the United States imposed by SAWRSA and the amendments. This shortfall is addressed in the amendments by the following: The amendments provide for a significant adjustment in the principal amount of the fund; B, the amendments also provide for the deposit in the fund of all proceeds of sale of recharge credits received by the United States in a managed recharge project in the Santa Cruz River, using a portion of the 28,200 acre-feet of effluent water deliverable by Tucson under SAWRSA. The amendments authorize the use of the Lower Colorado River Basin Development Fund to pay identified costs of implementing the settlement.

Under the amendments and related settlement agreement: Tucson, the city of Tucson, has agreed to provide repairs and funding to repair sinkhole damage in the San Xavier District on allotted lands and lands held in trust for the nation. Tucson has further agreed that the nation's claims for subsidence damages in the San Xavier and eastern Schuk Toak Districts are preserved and will be processed pursuant to the procedures outlined in the agreement.

Asarco, the copper mine, has agreed to accept Central Arizona Project water for processing ore at the Mission Mine and reduce groundwater withdrawals by an acre-foot for each acre-foot of CAP water delivered. The intended effect of this exchange is to stabilize or elevate the groundwater table in the San Xavier District. Subject to receiving adequate security to assure payment, the nation, the Tohono O'odham Nation, has agreed to provide a loan to Asarco to construct the CAP delivery system to the mine.

Farmers Investment Company has agreed to various limitations on its groundwater withdrawals affecting the San Xavier District. The agreement will be recorded in the official records of Pima County to assure the limitations bind successors in interest.

Finally, certain provisions of title 1 of the Settlement Act are essential to implementation of the amendments, and we have listed what the implementation process will be.

In conclusion, I would just like to highlight the Federal obligations under the new amendments. Section 311(c)(1) and (2) authorizes the Secretary to expend sums not to exceed $215,000 for the San Xavier District and $175,000 for the eastern Schuk Toak District for groundwater monitoring programs. Lastly, section 311(f) authorizes the Secretary to conduct a feasibility study of a land exchange between the allottees and Asarco at a cost not to exceed $250,000.

I would like to conclude my remarks by sharing that we are very proud of the process for reaching the compromises and agreements among all parties. This is a monumental task that we need to recognize and others need to use as an example of how parties from different backgrounds, tribal and non, can come together and reach a consensus on issues, especially an issue as critical as water.

The Tohono O'odham live in the desert. We have survived for generations in 110 degree weather, and water is a very precious commodity, and we would support the amendments and urge your consideration. We also, with respect to the other tribes who are also in need of this precious commodity, we ask that consideration be given to the amendments to this act.

Thank you.

[The prepared statement of Ms. Juan-Saunders follows:]

PREPARED STATEMENT OF VIVIAN JUAN-SAUNDERS, CHAIRWOMAN, TOHONO O'ODHAM NATION, SELLS, AZ

I. INTRODUCTION

Chairwoman Murkowski, Chairman Campbell and members of the Committees. I am Vivian Juan-Saunders, Chairwoman of the Tohono O'odham Nation. The Nation's Reservation is located in southern Arizona, has a land base of 2.8 million acres, and is the second largest Indian reservation in the United States.

On behalf of the 28,000 members of the Nation, I thank you for the opportunity to speak on the Arizona Water Settlements Act of 2003 which is an issue of critical importance to our people. I would like to first express my appreciation to Senator Kyl who co-sponsored introduction of the Settlements Act and was instrumental in securing a resolution among multiple parties with varied interests affected by the Settlements Act. I also extend my appreciation to Representative Hayworth who co-sponsored introduction of the Act, as well as other members of the Arizona delegation who have expressed their support.

I would also like to recognize the extraordinary efforts of the negotiating team in reaching a consensus on the issues which enabled the introduction of Amendments to the Nation's 1982 water settlement. The negotiating team included representatives of the Nation, the Nation's Legislative Council, the San Xavier District, the Schuk Toak District, the San Xavier allottees, the San Xavier Cooperative Farm, the State of Arizona, the City of Tucson, Asarco Incorporated and Farmers Investment Company. Officials in the Interior Department also actively participated in the negotiations.

The written testimony filed with the Committees includes a detailed summary of the Southern Arizona Water Rights Settlement Act of 1982 ("SAWRSA"); the Southern Arizona Water Rights Settlement Amendments Act of 2003 (the "Amendments"); and cost and appropriation items related to the Amendments.

I would like to focus on the benefits which would be realized by water users in the Tucson Management Area ("TMA") as a result of the enactment and implementation of the Settlements Act, with particular emphasis on the Amendments.

1. What has historically been wide-spread uncertainty regarding the rights of water users in the TMA would be transformed into certainty regarding these rights.

2. Receipt of several significant benefits under SAWRSA was conditioned on final dismissal of the underlying water litigation (*United States* v. *Tucson*), including the annual delivery of 28,200 acre-feet of water within the San Xavier and eastern Schuk Toak Districts of the Nation; and collection of damages by the Nation for failure of the United States to deliver water to the Districts. (Under the Amendments, the damage remedy would also apply to a failure of the United States to complete the rehabilitation and extension of the Cooperative Farm within stated deadlines.) In addition, the agreement by the Nation to waive and release past and future water claims, and past injuries to water rights, only takes effect on final dismissal of *United States* v. *Tucson.* By agreement among the parties to the Amendments this lawsuit will be dismissed with prejudice. Under the Amendments, the waiver and release of claims also extends to future injuries to water rights.

3. The parties' commitment to dismiss the lawsuit was predicated on resolving long-standing differences of opinion between the Nation, the San Xavier District and the San Xavier allottees regarding the division of water and financial benefits under SAWRSA. These disputes have been settled as follows:

(a) The Amendments provide an apportionment of water between the Nation, and the San Xavier District and San Xavier allottees.

(b) The Amendments provide the San Xavier District with the option to cash out the construction costs of a new farm authorized for construction under SAWRSA. If that option is exercised, the District and the allottees will be entitled to use the funds for a variety of purposes.

(c) The Nation has agreed to make a substantial financial contribution to subjugate lands within the proposed extension of the allottees' Cooperative Farm, provide working capital for the Cooperative Farm and to remediate contaminated groundwater within the San Xavier District. The amount of this contribution significantly exceeds the appropriations required by the Amendments.

4. A reliable source of funding is critical to the timely implementation of the Amendments. The interest on the Cooperative Fund established under SAWRSA is inadequate to fund the costs required to fulfill the obligations of the United States

imposed by SAWRSA and the Amendments. This shortfall is addressed in the Amendments.

(a) The Amendments provide for a significant adjustment in the principal amount of the Fund.

(b) The Amendments also provide for the deposit in the Fund of all proceeds of sale of recharge credits received by the United States in a managed recharge project in the Santa Cruz River, using a portion of the 28,200 acre feet of effluent water deliverable by Tucson under SAWRSA.

(c) The Amendments authorize the use of the Lower Colorado River Basin Development Fund to pay identified costs of implementing the settlement.

5. Under the Amendments and related Settlement Agreement:

(a) Tucson has agreed to provide $300,000 to repair sinkhole damage in the San Xavier District on allotted lands and lands held in trust for the Nation. Tucson has further agreed that the Nation's claims for subsidence damages in the San Xavier and eastern Schuk Toak Districts are preserved, and will be processed pursuant to the procedures outlined in the agreement.

(b) Asarco has agreed to accept Central Arizona Project (CAP) water for processing ore at the Mission Mine and reduce groundwater withdrawals by an acre foot for each acre foot of CAP water delivered. The intended effect of this exchange is to stabilize or elevate the groundwater table in the San Xavier District. Subject to receiving adequate security to assure repayment, the Nation has agreed to provide a loan to Asarco of up to $800,000 to construct the CAP delivery system to the Mine.

(c) Farmers Investment Company has agreed to various limitations on its groundwater withdrawals affecting the San Xavier District. The agreement will be recorded in the official records of Pima County to assure the limitations bind successors in interest.

6. Finally, certain provisions of Title I of the Settlements Act are essential to implementation of the Amendments.

(a) SAWRSA did not identify the source for the 28,200 acre feet of water. Title I identifies CAP agricultural priority water as the source of water to satisfy the annual delivery of the 28,200 acre feet identified in SAWRSA.

(b) Title I obligates the United States to firm the 28,200 acre-feet of CAP agricultural priority water to a municipal and industrial delivery priority, with financial or in kind assistance provided by the State of Arizona.

(c) Title I provides that unallocated CAP water and dedicated funding will be available for future Indian water settlements. These features of the Settlements Act are of particular importance to the Nation in order to facilitate the settlement of the Nation's remaining water claims in the Sif Oidak District and portions of adjoining Districts which are within the boundaries of the Pinal Active Management Area.

II. SOUTHERN ARIZONA WATER RIGHTS SETTLEMENT ACT OF 1982

A. Overview of Settlement

In 1975, the Papago Tribe (now the Tohono O'odham Nation), the United States and two individual Indian allottees, as representatives of a class of Indian trust allotment landowners in the San Xavier District, sued the City of Tucson and other water users in the Upper Santa Cruz Basin, claiming damages and seeking to enjoin pumping of groundwater (*United States* v. *Tucson*). There was concern that the litigation would cast a cloud over the future of the Tucson area. Local entities engaged in extensive negotiations with the United States and the lawyers for the Indian parties and finally reached a settlement in 1982. In October 1982, Congress passed the Southern Arizona Water Rights Settlement Act of 1982, 96 Stat. 1274 ("SAWRSA"), which embodied the settlement.

The terms of the settlement called for the Nation to receive, without charge, farm improvements, 66,000 acre feet of water annually, the right to pump 10,000 acre feet of groundwater annually within the San Xavier District and a $15 million trust fund. (Of the 66,000 acre feet, 37,800 acre feet is the Nation's contracted Central Arizona Project (CAP) water for the San Xavier District and the eastern Schuk Toak District.[1] An additional 28,200 acre feet of the water was to be acquired by the Sec-

[1] The Tohono O'odham Nation is the national government and consists of Districts organized as political subdivisions of the Nation. The San Xavier and Schuk Toak Districts are two of the 11 Districts of the Nation. The San Xavier District and the eastern portion of the Schuk Toak District are within the Upper Santa Cruz Basin and are part of the SAWRSA settlement.

retary and delivered after *United States* v. *Tucson* was dismissed.) The City was required to transfer 28,200 acre feet of effluent water to the United States and, with the State and other local entities, to contribute a total of $5.25 million to a Cooperative Fund. Interest on the Cooperative Fund was available to the United States for payment of the ongoing costs of implementing the settlement. The San Xavier allottees' water rights were to be satisfied out of water provided to the Nation in the settlement.

The City, State and local interests timely performed all of their obligations under the settlement and the Nation agreed to dismiss the case. The San Xavier allottee landowners objected to certain aspects of SAWRSA and opposed dismissal of the litigation.

In 1993, allottees filed a class action lawsuit (*Alvarez* v. *Tucson*) in which they sought to enjoin groundwater pumping by the City and others, and asserted more than $200 million damages. Individual San Xavier allottees also filed a lawsuit in 1993 against the United States (*Adams* v. *United States*) which asserted breaches of trust related to the allottees' land and water resources, and sought declaratory and injunctive relief. Dispositive motions in these lawsuits are pending before the Court. Rulings on the motions have been suspended to allow the SAWRSA parties to negotiate amendments which would resolve the outstanding issues among the parties.

For many years, the Nation, the San Xavier District, the Schuk Toak District, the allottees, the City of Tucson, the State of Arizona, Asarco Incorporated and Farmers Investment Co. negotiated amendments to SAWRSA that would allow full implementation of the settlement, provide important clarification in the allocation of existing benefits, and provide more flexible water use by the parties.

B. Specific Benefits and Obligations of Parties

The following is a summary of the substantive provisions of SAWRSA, as amended by the Southern Arizona Water Rights Technical Amendments Act of 1992 (106 Stat. 3256).

Nation's Benefits:

1. The United States is required to annually deliver 37,800 acre feet of CAP water without the Nation having to pay any OM&R or capital charges.

   a. 27,000 acre feet for San Xavier District
   b. 10,800 acre feet for eastern Schuk Toak District

2. The United States is required to improve and extend the allottees' Cooperative Farm in San Xavier and to construct irrigation works for a new farm in San Xavier to take the CAP water.

3. The United States is required to annually deliver an additional 28,200 acre feet of water suitable for agriculture, after the pending water claims litigation is finally dismissed.

   a. 23,000 acre feet to San Xavier District
   b. 5,200 acre feet to eastern Schuk Toak District

4. If the United States fails to deliver any of the 66,000 acre feet in any year after October 1992, it must pay the Nation damages equal to the value of the undelivered quantity of water (the deadline was extended to June 30, 1993 by the Technical Amendments enacted in 1992).

5. The United States established a $15,000,000 Trust Fund which is managed by the Nation, the interest from which can be used to develop land and water resources within the Nation.

Nation's Obligations:

1. The Nation agreed to file a stipulation for dismissal of United States v. *Tucson, and to file in court the allottee class representatives' petition to dismiss.*

2. The Nation agreed to waive and release all past claims of water rights or injuries to water rights, and to waive and release all future claims of water rights. This waiver and release encompasses past and future claims of federal reserved water rights in the San Xavier District and the eastern Schuk Toak District. The waiver and release does not take effect until *United States v. Tucson* is finally dismissed.

3. The Nation agreed to limit pumping of groundwater:

   a. To 10,000 acre feet per year in the San Xavier District
   b. To the 1981 pumping amount in the eastern Schuk Toak District

4. The Nation agreed to comply with the water management plan established by the Secretary of the Interior.

City's Obligations:

1. The City agreed to make 28,200 acre feet of effluent available to the Secretary.
2. The City contributed $15,000,000 to a Cooperative Fund, the interest from which is for "carrying out the obligations of the Secretary" under provisions of the settlement.

Other Obligations:

1. Other contributors to the Cooperative Fund were:

State of Arizona—$2,750,000
Anamax, Cyprus-Pima, AS&R ("Asarco"), Duval & Farmers Investment Co. ("FICO")—$1,000,000
United States—$5,250,000

2. If *United States v. Tucson* was not dismissed by October 1985, the Cooperative Fund was to be terminated and the contributed funds returned to the contributors (this provision was deleted by the Technical Amendments in 1992).
3. The United States is not obligated to annually deliver the 28,200 acre feet of water to the Nation until *United States* v. *Tucson* is finally dismissed.
4. The United States is not obligated to pay the Nation damages for failure to annually deliver any of the 66,000 acre feet of water until *United States* v. *Tucson* is finally dismissed.
5. The Nation can only use its settlement water within the Tucson Management Area (TMA).
6. The Nation can sell or lease settlement water, but only within the TMA.

III. SOUTHERN ARIZONA WATER RIGHTS SETTLEMENT AMENDMENTS ACT OF 2003

The Southern Arizona Water Rights Settlement Amendments Act of 2003 (the "Amendments") appears as Title III in the Arizona Water Settlements Act of 2003 (the "Settlements Act"). Subject to the satisfaction of all conditions to the effective date of the Amendments (Section 302), the Amendments will clarify, restate, supplement and modify the provisions of SAWRSA in the following respects:

1. The Secretary would be obligated to annually deliver 28,000 acre feet of water from the federal share of CAP water. The Secretary and the State are required to cooperate in a program to firm this CAP water or municipal and industrial delivery priority pursuant to the obligations in Section 105 of Title I to the Settlements Act.
2. The Secretary would be required to rehabilitate and extend the allottees' existing Cooperative Farm by a date certain, or pay specified penalties. The Farm would be extended to 2,300 acres. Rehabilitation of the Cooperative Farm would include bank stabilization on the Santa Cruz River and repair of sinkholes.
3. Pursuant to an agreement between the Nation, the San Xavier District and the allottees, the Nation would make a substantial financial contribution for subjugation of lands within the proposed extension to the Cooperative Farm, working capital for the Cooperative Farm and a fund to remediate contaminated groundwater within the District.
4. The San Xavier District would receive the option of taking cash instead of construction of a new farm.
5. Penalties payable by the United States for failure to timely perform its obligations with regard to the Cooperative Farm and its extension would be payable to the Cooperative Farm Association.
6. The San Xavier District and the allottees would be entitled to annually receive up to 35,000 acre feet of the settlement water for beneficial use, subject to compliance with the Nation's water code.
7. SAWRSA does not provide for specific releases of claims for future injuries to water rights. The release of claims for future injuries to water rights would be required by the Amendments so long as groundwater withdrawals outside the San Xavier District are in compliance with State law and with the related Settlement Agreement.
8. The waiver and release of water rights by the Nation and the allottees, other than the rights established in SAWRSA, would be confirmed, clarified and made more explicit. One of the conditions to the effective date of the Amendments would be final dismissal of the litigation. As to any allottees who opt out of a class, their water rights, if any, would be barred.
9. Lands acquired by the Nation outside the boundaries of the Nation's Reservation which the Nation seeks to have taken into trust by the United States will not include federal reserved rights to surface water or groundwater.
10. SAWRSA now limits the Nation to pumping no more than 10,000 acre feet of groundwater per year within the San Xavier District, with no provisions for underground storage and recovery. The Amendments would create a deferred pumping

storage account, with an initial credit to recognize a portion of the groundwater allowance that has not been pumped since 1983. Withdrawals from the deferred pumping storage account could not exceed 10,000 acre feet in any year or 50,000 acre-feet over any ten-year period. The Amendments would also allow direct underground storage and recovery of surface water, in a manner similar to that provided for under current State law. Comparable provisions are made for pumping groundwater within the eastern Schuk Toak District. The Nation could also pump additional groundwater during CAP shortage periods and interruption in CAP deliveries.

11. SAWRSA now requires that all of the Nation's water be used within the boundaries of the Tucson Management Area (TMA). The Amendments would allow the Nation to lease its water outside the TMA, after giving a right of first refusal to users within the TMA. It would also allow the Nation to use a portion of its settlement water within the Nation's Reservation outside of the TMA.

12. A new comprehensive Settlement Agreement among the Nation, the allottee classes, the United States, the State of Arizona, the City of Tucson, Asarco and FICO would be approved by the Amendments.

13. Separate agreements would be entered into among the Nation, United States, allottees and Tucson; the Nation, San Xavier District, allottees, the United States and Asarco; and the Nation, San Xavier District, allottees, United States and FICO. These agreements would be confirmed and approved by the Amendments.

a. The Tucson Agreement provides:

(i) For the payment by the City of Tucson of $300,000 to the San Xavier District to establish a sinkhole remediation fund to be used to maintain and repair any future sinkholes after the United States has completed its sinkhole repair project.

(ii) For the release by the United States and the allottees of past, present and future claims for damages from sinkholes or subsidence; release by the United States and the Nation of past, present and future claims for damages from sinkholes; and an administrative process for review by the City of any claim of the Nation for damages from subsidence before any court action is filed on such claim.

b. The Asarco Agreement provides:

(i) Up to 10,000 acre feet of the 35,000 acre foot allocation of CAP water for use in San Xavier will be delivered annually to Asarco for mining purposes in exchange for an equivalent reduction in groundwater pumping pursuant to a water agreement with the Nation.

(ii) Asarco will have an option to renew the existing on-Reservation well site lease with the Nation for an additional 25 year term.

(iii) Subject to adequate security to assure repayment, the Nation agrees to loan Asarco up to $800,000 for construction of a CAP delivery system repayable over a period not to exceed 14 years.

(iv) Pursuant to A.R.S. § 45-841.01, the Nation is qualified to earn marketable storage credits which have an assigned value under the Asarco Agreement and are used to repay the Asarco loan and thereafter apportioned between the Nation and the San Xavier District.

(v) With the exception of discharges of toxic or hazardous substances to groundwater, certain claims for groundwater contamination by Asarco are settled by Asarco payments of water lease delivery charges into a settlement fund, with Asarco making additional direct payment from its funds to the extent of any shortfall in the scheduled payment amount.

(vi) Waivers and releases of all past and future claims by the Nation, San Xavier District, allottees, United States and Asarco related to withdrawal of groundwater by the parties within the TMA.

c. The FICO Agreement provides:

(i) Limitation of 850 acre feet annual withdrawal of groundwater by FICO within two miles of the exterior boundaries of the San Xavier District.

(ii) Limitation of 36,000 acre feet annual withdrawal of groundwater by FICO from all FICO lands.

(iii) Prohibition on FICO from selling groundwater credits to third parties for withdrawal within three miles of the exterior boundaries of the Tohono O'odham Nation.

(iv) Except as otherwise provided in (i), (ii) and (iii) above, waivers and releases of all past and future claims by the Nation, allottees, United States and FICO related to withdrawal of groundwater by the parties within the TMA

(v) FICO shall record the Agreement in the official records of Pima County upon the effective date of the Amendments.

(vi) Terms of the Agreement are binding on heirs, devisees, executors, assigns and successors of the parties.

IV. FUNDING COSTS UNDER AMENDMENTS

The following is a summary of the various provisions in the Amendments that authorize use of the Lower Colorado River Basin Development Fund. The summary first discusses federal obligations in the Amendments that arise from obligations in SAWRSA and second new federal financial obligations under Amendments.

A. Federal Obligations Arising From SAWRSA

Section 304(c)(3)(B): Authorizes the Secretary of the Interior to pay to the San Xavier District the sum of $18,300,000 in lieu of and in full satisfaction of, the obligation of the Secretary to construct a "new farm" in the San Xavier District including design and construction activities relating to additional canals, laterals, farm ditches, and irrigation works for the efficient distribution of water described in section 303(a)(1)(A) of SAWRSA. Use of the funds is regulated pursuant to section 304(f).

History of the Expenditure. Section 303(a)(1)(B) of SAWRSA directs the Secretary, acting through the Bureau of Reclamation, to improve and extend the irrigation system, including the design and construction of additional canals, laterals, farm ditches and irrigation works, necessary for the efficient annual distribution for agricultural purposes of 27,000 acre feet of water referred to in 303(a)(1)(A) of SAWRSA. Section 304(c)(3)(B) of the Amendments gives the San Xavier District the option to cash out the construction benefit of a new farm and thereby use the portion of the 27,000 acre feet annual distribution not required for the existing or extended Cooperative Farm for other purposes. Identification and retention of this amount in the Lower Colorado River Basin Development Fund is a condition to the Amendments becoming effective pursuant to section 302.

Sections 308(d)(2)(A)(i) and (ii): Authorizes the Secretary to enter into a contract with the San Xavier District and to pay a sum not to exceed $891,200 for the development of a water management plan for the San Xavier District and authorizes the Secretary to enter into a contract with the Nation and to pay a sum not to exceed $237,200 for the development of a water management plan for the eastern Schuk Toak District.

History of the Expenditure. Section 303(a)(3) of SAWRSA directs the Secretary, acting through the Bureau of Reclamation, to establish water management plans for the San Xavier District and the eastern Schuk Toak District, that have the same effect as those plans developed under State law. Identification and retention of this amount in the Lower Colorado River Basin Development Fund is a condition to the Amendments becoming effective pursuant to section 302.

Section 310(a)(2)(A)(ii): Establishes that the Cooperative Fund may be increased in principal by an amount not to exceed $32,000,000 based on a determination by the Secretary that the additional funds are necessary to carry out the Amendments and after providing notice to Congress.

History of the Expenditure. Section 313(b)(3)(B) of SAWRSA provided for an additional sum up to $16,000,000 which the Secretary determined to be necessary to meet the Secretary's obligations, after providing notice to Congress. SAWRSA provides that the $16,000,000 shall be adjusted pursuant to section 312(b)(2). Section 313(b)(2) states that the adjustment represents the additional interest that would have been earned by the Cooperative Fund had the monies been contributed initially. The Technical Amendments to SAWRSA enacted in 1992 inadvertently dropped the reference to the means for calculating the adjustment. Thus, the requirement to adjust the $16,000,00 existed between 1982 and 1992.

Section 317(a)(1): Authorizes an expenditure of $3,500,000 (adjusted for fluctuations in construction costs) to construct features of the irrigation systems described in sections 304(c)(1) through (4) that are not authorized to be constructed under any other provision of law.

History of the Expenditure. Section 303(a)(4) of SAWRSA authorizes the appropriation of up to $3,500,000, adjusted for fluctuations in construction costs.

Section 317(a)(5): Authorizes an expenditure of $4,000,000 to carry out section 311(d).

History of Expenditure. Section 303(b)(1) of SAWRSA authorized the Secretary to carry out a study to determine the available and suitability of water resources within the Sells Reservation. Identification and retention of this amount in the Lower Colorado River Basin Development Fund is a condition to the Amendments becoming effective pursuant to section 302.

B. New Federal Obligations of Amendments

Sections 311(c)(1) and (2): Authorizes the Secretary to expend sums not to exceed $215,000 for the San Xavier District and $175,000 for the eastern Schuk Toak District for groundwater monitoring programs.

History of the Expenditure. The tribal parties and the federal team reached agreement on this new obligation prior to the introduction of S. 3231, the Arizona Water Settlements Act of 2000. Identification and retention of this amount in the Lower Colorado River Basin Development Fund is a condition to the Amendments becoming effective pursuant to section 302.

Section 311(f): Authorizes the Secretary to conduct a feasibility study of a land exchange between the allottees and Asarco at a cost not to exceed $250,000.

History of the Expenditures. This is a new obligation. The introduction of S. 2992, the Arizona Water Settlements Act of 2002, included a land exchange study with Asarco but did not provide a specific dollar amount for the study. The Amendments have included a sum not to exceed $250,000. Identification and retention of this amount in the Lower Colorado River Basin Development Fund is a condition to the Amendments becoming effective pursuant to section 302.

Senator MURKOWSKI. Thank you very much.

Ms. Kitcheyan, welcome.

STATEMENT OF KATHLEEN W. KITCHEYAN, CHAIRWOMAN, SAN CARLOS APACHE TRIBE, SAN CARLOS, AZ

Ms. KITCHEYAN. Good morning, Chairwoman Murkowski, Chairman Ben Nighthorse Campbell, Senator Kyl from the great State of Arizona, and Senator Bingaman and other distinguished members.

My name is Kathy W. Kitcheyan. I am the chairwoman of the San Carlos Apache Tribe. On behalf of the tribe, I would like to extend my appreciation to you for giving us an opportunity to testify today.

Our land base is just under 2 million acres. We have a population of approximately 13,000 tribal members. Please accept my comments on behalf of the tribe. As you know by now, the San Carlos Apaches are opposing the GRIC settlement. GRIC would receive enormous quantities of water from the CAP canal and other sources delivered to the GRIC reservation, 60 miles downstream from our San Carlos Apache Reservation to mitigate and replace what GRIC has agreed others can use from streams on our land and the Gila River.

Absolutely no one should have the right to say what can be used from our land. The Gila River on our reservation will most certainly die under the GRIC settlement. It suffers greatly now, as do our tribal members, from the violations to the Globe Equity decree and Arizona versus California by nits in the upper valleys of Arizona and New Mexico. The GRIC settlement disregards those decrees and our decreed rights. It stands Federal law and the law of two States, as well as two Federal decrees, on their heads. It does all of this in profound injury to our river, our land, and our people.

In our culture water is sacred. This may be difficult for some of you to understand, but it is the lifeline of our existence, along with our language and our culture and our spirituality. Therefore, the health of the Gila River reflects the health of our land and our people. To kill the river with more diversions than the river can provide and still remain clean and healthy is a crime. Right now the river is not running. Yet, upstream from us the turbine pumps hum 24 hours a day to irrigate 40,000 acres of lush crops. In com-

parison, our tribal farm is only 400 acres, and there is not enough water for it as it is.

Coolidge Dam, which was named after one of our presidents, President Calvin Coolidge, is synonymous with San Carlos Lake. It is located on our reservation and it is fed by the Gila River. It is going dry. When the lake is healthy, it provides recreation for up to 250,000 annual visitors, and it is a critical environmental asset for the Southwest. However, with the dam going dry there is a possibility of endangered species dying—the willow flycatcher, the bald eagle, the razorbacked sucker, and the peregrine falcon.

This is the reason we have tried for decades to get a minimum pool established in the lake of at least 75,000 acre-feet. We can store our CAP water from our 1992 Settlement Act there, but only if we pay $74 an acre-foot for the CAP water. The same water costs the non-Indian farmers $28. Is that fair? This situation will get worse under titles 1 and 2 of the act.

Of course, before we can store CAP water in the Coolidge Dam the water must first run out of the mountains in New Mexico and escape the pumps in the upper valleys. This is a rare occurrence now. Today the only water in the dam, about 30,000 acre-feet, was purchased by the tribe at a cost of $66 per acre-feet. But for the tribe's purchase, the lake would be dead right now. This problem will get worse under the GRIC settlement.

As it is, we are not permitted to store our Globe Equity water in Coolidge Dam. We must divert it from the flowing river. We have the earliest priority above Coolidge Dam at 1846 to divert the waters of the Gila River. Still, the river does not run to us. It is diverted by the pumps of the upper valley. This will get worse if the bill before you is enacted and survives our court challenges.

What is very clear and transparent is that our neighbors upstream do not obey the law of the decree. They do not obey the State law of prior appropriation. We do, they do not. Yet this bill will somehow make it legal, retroactively legal. This is the second time they have tried to avoid the decree in the many court cases we have won over decades of litigation. They got the Arizona legislature to do the same scheme a few years ago and the Arizona Supreme Court said that was unconstitutional, not just a little bit.

This bill is much worse. Congress should look long and hard at this bill before it sets a course which upsets the prior appropriation law of the West and Federal decrees such as the Globe Equity and Arizona versus California decrees, and the vested property rights of the tribe and thousands of others who expect to take our water only in turn when there is a shortage.

The BIA stipulated that GRIC will get the first 210,000 acre-feet under the Globe Equity decree to irrigate 35,000 acres, and until they got that the Apaches could not get any of the 6,000 acre-feet to irrigate the 1,000 acres on our reservation. This agreement was punitive. To make it worse, the BIA built Coolidge Dam on our reservation and flooded out our farms, homes, mill, and the graves of our ancestors. We were not allowed to store our meager 6,000 acre-feet in the lake, and even if we could we have no way or electricity to get the water out of the lake in order to use it.

The power site at Coolidge Dam belongs to the San Carlos Apache Tribe. Instead of paying the power proceeds to us required

by the Federal Power Act of 1928, Congress promised our tribe that it would receive electricity power at 2 mills for irrigation, schools and agency purposes and a power line from Coolidge Dam to the little town of Bylas. We are still waiting.

A very important use for basin project funds under the CAP was to pay for reduced power generation in Coolidge Dam in the event New Mexico received CAP water. All of the diversions authorized by the legislation before you reduce the value of the power site and the potential electricity and revenue from power generation at Coolidge Dam.

Senator MURKOWSKI. Ms. Kitcheyan, I am going to have to ask you to wrap it up very soon.

Ms. KITCHEYAN. I am going to wrap it up here, okay.

We certainly do not need more paper unless that paper is somehow respected. We need a fair share of the water which is being diverted upstream. We need to receive the CAP water that we have been entitled to since 1980. We need to receive the water and CAP funding that we are entitled to in our 1992 settlement. Our CAP water price should be reasonable. We should get a fair share of the basin project fund and revenues, including a fair share of the power revenues. Unlike GRIC and SCIDD, we do not have a CAP canal running through our land to bring Colorado River. No one can make us whole by replacing our water with anything downstream. If the Gila River does not flow, we have no way to get water for the 1,500,000 acres of our readiness in the Gila Valley.

In conclusion, Madam Chair, I would like to emphasize that San Carlos Apaches and the U.S. Government had a treaty approved in 1852. As you know, my ancestors did not ask for this treaty. At the origin of this treaty we had over 2 million acres of prime real estate. Unfortunately, it was so prime that the U.S. Government reduced it five times: in 1873, in 1874, 1876, and 1877, respectively. This was done to pacify the greed of miners and ranchers because they had discovered gold, silver, copper, and water.

Yet our Apache people remained loyal and loved their country. They sent their men to World War I, and these soldiers were not even U.S. citizens at the time. This came later, in 1924. World War II came again and many of our men served and died. They did not even have the basic tenets of citizenship. They could not vote until 1948.

A San Carlos Apache was the first soldier to die in the Gulf War. I remember this day like I remember the day when John F. Kennedy died. Veterans Day is very important to us. We celebrate it. Senator Kyl was one of our grand marshals a few years back.

I share all of this with you——

Senator MURKOWSKI. Ms. Kitcheyan, I am going to have to ask you to—you have gone over your time twice.

Ms. KITCHEYAN. Okay. I have 10 seconds, ma'am.

Senator MURKOWSKI. Okay.

Ms. KITCHEYAN. I share all of this with you to inform you and remind you of all the injustices and inequities suffered by my people, and if the GRIC settlement is approved without any consideration of us, the San Carlos Apaches, then once again the U.S. Government will have failed to uphold their own treaty—did we not just hear about trust responsibilities?—in which they promised to

protect our land, natural resources, act in good faith, and to legislate in the best interests of the San Carlos Apaches.

Thank you, Madam Chair. I am sorry I took more time than you thought was necessary, but I came thousands of miles to be heard. Thank you.

[The prepared statement of Ms. Kitcheyan follows:]

PREPARED STATEMENT OF KATHLEEN W. KITCHEYAN, CHAIRWOMAN, SAN CARLOS APACHE TRIBE, SAN CARLOS, AZ

Good morning Chairwoman Murkowski, Chairman Ben Nighthorse Campbell, Senator Kyl and Members of the Committee. I am Kathy Kitcheyan, Chairwoman of the San Carlos Apache Tribe. The Tribe thanks the Chairwoman and the Committee for the opportunity to testify today.

The Tribe submitted formal written testimony yesterday. I'm a school teacher and I am sure you are all prepared for a quiz on our papers.

It troubles the Tribe to oppose Title I and II of the Act and the associated agreements, exhibits and attachments which total nearly 4,000 pages. However, the physical burden of substantially all of the provisions of Title II, which we refer to as the GRIC Settlement, and which deals with the Gila River and its tributaries upstream on the Gila River from our Reservation, are suffered by our Tribe—the Apache People—not by GRIC.

GRIC would receive enormous quantities of water from the C.A.P. Canal and other sources delivered to the GRIC Reservation 60 miles downstream from our San Carlos Apache Reservation to mitigate and replace what GRIC has agreed others can use from streams on our land and the Gila River.

The Gila River on our Reservation will most certainly die under the GRIC Settlement. It suffers greatly now, as do our Tribal Members, from the violations to the Globe Equity Decree and *Arizona v California* by interests in the Upper Valleys of Arizona and New Mexico. The GRIC Settlement disregards those Decrees and our Decreed rights. It stands Federal law, and the law of two States, as well as two Federal Decrees on their heads. It does all of this in profound injury to our River, our Land, and our People.

We Apaches are patriots. We have fought for America as special forces and Marines in disproportionate numbers compared to others. That is true as we speak. Our Tribal Members are among the first to go into battle all over the world in defense of freedom and the United States. A San Carlos Apache was the first soldier to die in the Gulf War. Veterans Day—not any other—is the most important day to our Tribe, as Senator Kyl knows personally. He honored the Tribe as the Grand Marshall of our Veterans Day Parade a few years back.

Senator Kyl—remember that Day??? It rained and rained. I hope you understand that rain is a blessing from our Creator. It may have "rained on your parade", but in our culture, the Creator blessed your presence and the Tribe that day. We need you to come back. We need some more rain.

Please understand, in our culture the Gila River—all rivers and springs—are sacred. The health of the Gila River reflects the health of our land and our People. To kill the River with more diversions than the River can provide and still remain clean and healthy, is a crime against us. Right now the River is not running, yet upstream from us the turbine pumps hum 24 hours a day to irrigate 40,000 acres of lush crops. Downstream, our farm is dead.

San Carlos Lake, which is located on our Reservation and fed by the Gila River, is going dry. When the Lake is healthy it provides recreation for up to 250,000 visitors a year, and is a critical environmental asset for the Southwest. It will die with millions of fish and birds being harmed. That is the reason we have tried for decades to get a Minimum Pool established in the Lake of at least 75,000 acre-feet. We can store our C.A.P. water from our 1992 Settlement Act there—but only if we can pay the $74 an acre-foot for this C.A.P. water that only costs the non-Indian farmers $28. This situation will get even worse under Titles I and II of the Act.

Of course, before we can store C.A.P. water in San Carlos Lake, the water must first run out of the mountains in New Mexico and escape the pumps in the Upper Valleys. That is a rare occurrence now. Today, the only water in the Lake—about 30,000 acre-feet—was purchased by the Tribe at a cost of $66 per acre-foot. But for the Tribe's purchase, the Lake would be dead right now. This problem will only get profoundly worse under the GRIC Settlement.

We are not allowed to store our Globe Equity water in San Carlos Lake. We must divert it from the flowing River. We have the earliest priority above Coolidge Dam at 1846 to divert the waters of the Gila River. Still the River does not run to us—

it is diverted by the pumps of the Upper Valley. This will also get worse if the bill before you is enacted and survives our Court challenges.

What is clear to us is this. Our neighbors upstream do not obey the law of the Decree. They do not obey state law of prior appropriation. We do—they don't. Yet, this bill will somehow make all that is illegal—retroactively legal. This is the second time they have tried to avoid the Decree and the many court cases we have won over three decades of litigation. They got the Arizona legislature to do this same scheme a few years ago and the Arizona Supreme Court said that was unconstitutional. Not just a little bit, but pervasively so. This bill is much worse. Congress should look long and hard at this bill before it sets a course which upsets the prior appropriation law of the west, and federal decrees such as the Globe Equity and *Arizona* v. *California* Decrees, and the vested property rights of the Tribe and thousands of others who expect to take our water only in turn when there is a shortage.

When the waters flow in the Gila on our Reservation now, it is either an enormous flood—which first must fill up the Upper Gila Valley aquifers—before it can come through our Reservation, and then, only in high volume flows. Even then, when the River is running on priority, the first 437.5 c.f.s. must be bypassed by us for the benefit of SCIP, which is the BIA project which delivers water to GRIC and the non-Indian San Carlos Irrigation and Drainage District, which we call SCIDD.

The BIA stipulated that GRIC would get the first 210,000 acre-feet under the Globe Equity Decree to irrigate 35,000 acres, and that until they got that, the Apaches could not get any of the 6,000 acre feet to irrigate the 1,000 acres on our Reservation. This agreement was punitive. To make it worse, the BIA, built San Carlos Lake on our Reservation and flooded out our farms, homes, grist mill and the graves of our relatives. We were not allowed to store our meager 6,000 acre-feet in the Lake, and even if we could, we have no way or electricity to get the water out of the Lake in order to use it.

The power site at Coolidge Dam belongs to the San Carlos Apache Tribe. Instead of paying the power proceeds to us required by the Federal Power Act in 1928, Congress promised our Tribe that it would receive electricity power at 2 mils for irrigation, schools and agency purposes, and a power line from Coolidge Dam to the town of Bylas. We are still waiting. A very important use for Basin Project funds under the C.A.P. was to pay for reduced power generation in Coolidge Dam in the event New Mexico received C.A.P. water. All of the diversions authorized by the legislation before you reduce the value of the power site and potential electricity and revenue from power generation at Coolidge Dam.

The water quality in the Gila River makes us ill. It damages our teeth. Because it contains high concentrations of heavy metals, including eight times the safe drinking water level for copper. The poor water quality of the River contributes and complicates other health problems suffered by the Tribe, including what appears to be a cancer cluster at Bylas on the Reservation. The River on our Reservation is classified by Arizona as "not swimmable or drinkable." We understand why this is so when it is dry. We do not understand why the River is not "swimmable and drinkable" when it runs.

The waters of the River also kills our crops and damages our land. The water quality in the Gila River will only get worse as a result of the legislation before you. We have a water quality injunction imposed by the Federal Court in Globe Equity to give us water under the Decree to grow moderately salt sensitive crops, as we once did in the past. That was not in the distant past.

My mother and father farmed on the Gila River. We grew those crops and our family and other Apaches ate them. That was before the massive pumping started in the Upper Valleys and the San Simone River Valley. The San Simone River doesn't even run any more. Pumping which only began in the 1950s dried it up. The U.S.G.S. took out the gage just a few years ago. All this will be made worse by the GRIC Settlement.

In settlement discussions which have occurred periodically since the mid 1970s, we have been trying to get only the water which we historically used to farm 8,600 acres and the water for the 1,000 acres under the Globe Equity Decree. No matter what the number would be in a settlement, one or a million, we cannot receive it unless the parties upstream obey the law and respect our rights.

We certainly don't need more paper unless that paper somehow is respected. We need a fair share of the water which is being diverted upstream. We need to receive the C.A.P. water that we have been entitled to since 1980. We need to receive the water and C.A.P. funding that we are entitled to under our 1992 Settlement. Our C.A.P. water price should be reasonable. We should get a fair share of the Basin Project Fund and revenues—including a fair share of the power revenues to pay our OM&R for C.A.P. Unlike GRIC and SCIDD, we do not have a C.A.P. canal running through our land to bring Colorado River water under the C.A.P. No one can make

us whole by replacing our water with anything downstream. If the Gila River does not flow, we have no way to get water for the 1,500,000 acres of our Reservation in the Gila Valley.

We Apaches have a Treaty that was approved by the President and this Senate in 1852. It says that the United States will protect our land, act in good faith, legislate for our happiness and well being. We know how weary you must be hearing the horrors and difficulties that Tribes have suffered. We are weary of suffering them.

I see that the elected leaders of the White Mountain Apache Tribe, the Yavapai-Apache Nation and the Tonto Apache Tribe are here. If they had been allowed to testify, I am confident that each would say "We have kept our word to the United States. We believe the word of a great nation never gets 'too old to keep.'" Still we wait and expect each day that the law of this Nation will be kept and honored and enforced,

We respectfully ask your protection and assistance here. This legislation and the agreements it authorizes, ratifies, and confirms unlawful conduct and violations of the Globe Equity Decree and Arizona and New Mexico law. It adversely affects the Gila River and Bonita Creek and Eagle Creek on our Reservation, and other tributaries upstream from us. It adversely impacts the chance that our C.A.P. project and those of other C.A.P. Tribes, such as the Yavapai-Apache Nation and Tonto Apache Tribe will ever be built. This legislation will also adversely impact the cost and reliability of C.A.P. water for all Arizona C.A.P. Tribes, except for GRIC.

Titles I and II should not be adopted by this Senate as introduced. If Congress had been asked to authorize, ratify, and confirm by means of legislation a settlement agreement that would result in this level of unprecedented damage to a people and the environment, as well as vested property rights for anywhere else in the country, Congress would not consider such legislation—even for a moment. We ask that Congress not enact such legislation now. We ask only for fairness and equity. More than that—no one is entitled to. Less than that cannot be tolerated by this body.

Thank you again for hearing these words on behalf of the San Carlos Apache Tribe. We ask for these comments and a copy of the Summary of Elements Needed for the Settlement of the Resources of the San Carlos Apache Tribe and Its Reservation be made part of the record, and that we be allowed to supplement the record in response to statements by others which are made part of the record.

Respectfully submitted this 30th day of September 2003.

SUMMARY OF ELEMENTS NEEDED FOR THE SETTLEMENT AND PROTECTION OF THE RESOURCES OF THE SAN CARLOS APACHE TRIBE AND ITS RESERVATION WITHIN THE UPPER GILA SUBWATERSHED—ARIZONA

1. A permanent Minimum Pool of not less than 75,000 acre feet of water stored on the San Carlos Apache Reservation in San Carlos Lake behind Coolidge Dam, which does not spill, and is reliably supplemented to replace losses related to evaporation and seepage for the protection of fish, wildlife, cultural resources, public health, safety and recreation, and reimbursement for the water purchased by or for the Tribe which has previously been expanded to establish and maintain a Minimum Pool.

2. 48,000 acre feet of water from the mainstem of the Gila River with an "immemorial" priority date. This represents 4.5 acre feet of water for 9,600 acre feet of historically irrigated lands on the Reservation and 1,000 acres of land under Globe Equity No. 59 and thirty-three percent (33%) of the storage rights for the water on San Carlos Lalce, after deducting the Minimum Pool.

3. The right to divert, store and consumptively use all groundwater, tributary water and effluent water on the Reservation.

4. The Central Arizona Project ("CAP") Contract between the United States and the San Carlos Apache Tribe dated December 11, 1980, as amended, for water previously allocated to the Tribe to be made permanent; the priority and reliability of the water in that CAP Contract to be preserved and enforced; the delivery of CAP water by exchange under the Contract confirmed as mandatory, subject only to the available CAP supply and the Tribe's present CAP Contract priority; equitable funding for the infrastructure to exchange, deliver and distribute all Apache Tribal CAP water be made mandatory from the Lower Colorado River Basin Development Fund, and an equitable share of all other CAP appropriations for the Tribe's CAP project, design and construction; and the Tribe's CAP Water be delivered to its head gates at the "postage stamp" electrical rate under CAP; waiver of any remaining capital debt related to CAP or Leavitt Act of July 1, 1932, 47 Stat. 564, 25 U.S.C. 386a.

5. Confirmation that certain lands within the Reservation, including the bed of the San Carlos Lalce subject to a flowage easement for SCIP only, are held in trust by the United States for the benefit of the Tribe; together with capital funding to relocate the fences to show the correct legal boundary as reflected in Map 388 titled "Sketch, of Eastern Portion of White Mountain Indian Reservation, A.T. 1874", National Archives Record Group 75.7.2 dated 1874 and the Executive Order of President U.S. Grant dated July 21, 1874.

6. A capital trust fund for planning, design, development, training, education, equipment and start up initial operation costs for 15,600 acres of irrigated agriculture on the Reservation.

7. A capital trust fund to construct basic transmission and distribution systems for water, sewage, electricity, telephone services on the Reservation.

8. A full accounting and compensation for all of the electricity generated, and revenue and other consideration received by the United States related to the generators located in Coolidge Dam; fair compensation for the value of power production of the Coolidge Dam site and for failure of BIA to deliver 2 mil power to the Tribe for irrigation, school, and agency purposes pursuant to Seventieth Congress, Session I, Ch. 1371928, section 10(e) of the Federal Water Power Act and section 5 of Regulation 14 of the Federal Power Commission; and 45 Stat. 210, 211; 43 U.S.C. § 1543(d)(2); and 16 U.S.C. 791, et seq.; see also 105 Stat. 1722, 1730 (December 12, 1991).

9. A full accounting for all revenue and all other consideration received by the United States pursuant to 27 Stat. 469 (February 20, 1893) and 29 Stat. 321, 358-60 (June 10, 1896); and fair compensation to the Tribe.

10. Compensation for the loss of the use of our historically irrigated Tribal farm, and salt damage to our farm land, along the Gila River.

11. Cultural Resources and Tribal graves protection trust fund to recover, stabilize and protect our graves, cemeteries and cultural sites around San Carlos Lake exposed to erosion, desecration and looting us a result of BIA construction and operation of Coolidge Dam.

Senator MURKOWSKI. And I appreciate your testimony along with that of the other panel members, and we do recognize the contributions that all of you have made in order to get here. It is difficult to keep within the time parameters, but in fairness to the remaining panel members it is important that we stick with it.

At this point in time I would like to take the opportunity for a few questions. Governor Narcia, the Gila River originates in New Mexico, obviously an important source of water for that State. Can you explain the steps that you have taken to coordinate this settlement with the rights and claims the State can assert under existing law?

Mr. NARCIA. Madam Chair, the answer to your question involves three components—is this on?

Senator MURKOWSKI. I think you are on, yes.

Mr. NARCIA. First, have settlements been reached between Arizona and New Mexico interests with respect to the interstate components of the settlement framework? The answer to this question is yes, definitely. As you are aware, New Mexico water users are implicated in the Globe Equity '59 enforcement proceedings in Federal court. The community has reached an agreement that incorporates Verdant Valley water users into our efforts to settle that litigation.

Secondly, with respect to the exchange required by the 1968 act, the community has engaged with appropriate Arizona and New Mexico parties in a diligent effort to address all the concerns and objectives raised by the State of New Mexico.

Finally, let me take this opportunity to assure both committees that if any unanticipated interstate issues should arise, I have directed individuals representing the community to give these matters their full and immediate attention and resolution.

Senator MURKOWSKI. Thank you. I appreciate that.

We have heard from the administration's reference to the Secretary of the Interior's Water 2025 initiative. Do you believe that this settlement is consistent with that water initiative?

Mr. NARCIA. Yes, yes, we do. We recognize that Arizona includes large areas designated by the Secretary as areas where water conflict is either substantially or highly likely to occur by 2025. We believe that the components of our settlement can and will be held up as an example of the framework that potential water conflicts, by using each of the six principles articulated by the Secretary. I will address one of the principles in my testimony and provide written testimony concerning the other five if that is acceptable to the chairperson.

The third principle involves maximizing the water use efficiency. The settlement does this in two important ways. First, it builds upon Arizona's longstanding effort to treat groundwater as a finite resource and to instead emphasize the use of renewable surface water supplies. Under this settlement both communities and other parties are required to constrain their groundwater use.

Second, the settlement looks at every opportunity to maximize the use, to help the community to achieve its water budget. In some instances we have reached effluent exchange agreements with our neighboring communities to achieve this objective. In my written submission I look forward to providing more detail on how this settlement is consistent with other—with each of the other principles.

Senator MURKOWSKI. Thank you, Governor Narcia.

Ms. Kitcheyan, your comments make it very clear that the San Carlos Apache Tribe is not there yet. They oppose the settlement. We heard from the administration before this panel suggesting that it is very important to the settlement that the San Carlos Apache Tribe settlement be included as part of this. Do you see any area in the middle, any way that it can be included as part of this settlement?

Ms. KITCHEYAN. The San Carlos Apaches have been acting and negotiating in good faith with the Department. We will continue to do so. But I will be forthright and let you know that I do not know if we can settle it in the near future. I hope so. But you know, a part of this depends on what San Carlos Apaches can get as well.

Senator MURKOWSKI. Thank you.

Senator Bingaman.

Senator BINGAMAN. Thank you very much.

Let me ask President Shirley from the Navajo Nation a couple of questions here. You mentioned that the Bureau of Reclamation is currently studying potential water supplies for Navajo communities in the Little Colorado River Basin, including the use of water from the Blue Ridge Reservoir. Do you know anything about the time frame for completing that study, and will that provide recommendations for addressing the water supply needs that the Navajo Nation has in this basin?

Mr. SHIRLEY. Thank you, Senator Bingaman. I will go ahead and have our water rights attorney, Mr. Sandy Pollack, to help me answer that question. But the contractor's work is done, Senator Bingaman, but the Reclamation believes that the work was not

adequate and has formed a technical working group to revise the report. The settlement negotiations are not expected to resume by the final report.

Sandy.

Mr. POLLACK. Thank you, Mr. President.

Senator Bingaman, I think that President Shirley really outlined it for you. That study has actually been completed. The Bureau of Reclamation is trying to revise the report. Apparently it didn't address all the concerns Senator Kyl had directed in authorizing that particular study to be done. The important point about that study is that settlement negotiations on the Little Colorado adjudication are really predicated on receiving that report, and we just simply cannot move forward with addressing our issues in Arizona until that report is done.

Senator BINGAMAN. Okay. Let me also ask, President Shirley: I believe you stated in your testimony that it is critical from the Navajo perspective that Window Rock be served by the Navajo-Gallup Project so that that project would be part of what you would be asking authorization for when you present us with possible legislation this next year. Is that the correct understanding of that?

Mr. SHIRLEY. Yes, I believe you have the correct understanding, Senator Bingaman. It is very important. Some of these things happen only one at a time and at very strategic times, and this is such a case with the Navajo-Gallup water line project. If we cannot do it now, bringing water to Window Rock, I do not know if there is going to be another opportunity to do so. So it is very critical that Window Rock is included in the Gallup, the Navajo water line project at this point in time.

Senator BINGAMAN. The other piece of this which makes you so concerned about this bill as it currently stands is you need an allocation of CAP water in order to meet this demand, meet these water needs there in Window Rock, as I understand it?

Mr. SHIRLEY. Exactly, that is very true. We need 6400 acre-feet of water from the CAP water at the current time to make the Gallup water line project work. If this legislation that is before us is going the tie the hands of the Secretary to allocate additional water, we cannot get at that water, and we need that water.

Senator BINGAMAN. That is the basis for your objection to this 104(b), section 104(b), where it says the reallocation of agricultural priority water under subparagraph (a) shall be subject to the condition that first, before the Secretary may reallocate the water to any Arizona Indian tribe—that would include you—Congress would have to enact a law approving an Indian water rights settlement for that Arizona Indian tribe that provides for the reallocation.

Essentially, we would be legislating here a prohibition on the Secretary doing what you believe the Secretary needs to do in order to meet your needs?

Mr. SHIRLEY. Exactly.

Senator BINGAMAN. Let me ask one or two other questions if I could here. Governor Narcia, in your view is it absolutely essential that Colorado River Lower Basin Development Fund be used as the source of funding to implement this bill?

Mr. NARCIA. Senator Bingaman, the specific process for funding this settlement is absolutely, absolutely fundamental to our settle-

ment. Without it, our settlement simply will not work. First, obviously we can give up our claims in exchange for sufficient water and a revenue stream that vests immediately and that is guaranteed. Secondly, the funding mechanism is also an important component, ensuring that Central Arizona Project portions of this legislation in title 1 will operate as intended.

Third and perhaps most importantly, the funding mechanism of this bill is the strongest possible affirmation that the Federal Government is serious about reaching a fair and binding settlement with every Arizona Indian tribe that is willing to negotiate in good faith. For the first time, the United States will be able to negotiate with Indian tribes in Arizona knowing that if they are able to reach a settlement they will have the revenue, a certain quantity of CAP water, and the resources to guarantee that the operations, maintenance, and the replacement costs associated with that water can be paid for both for this generation and the next generation to come.

Senator BINGAMAN. Let me ask one additional question, Governor Narcia. The State Engineer, John D'Antonio, is going to testify in the next panel. He indicates in his testimony that New Mexico is working cooperatively with your community, the Gila River Indian Community, to develop an agreement where the community could serve as the exchange partner, so that New Mexico could actually go forward and begin to use that 18,000 acre-feet that was reserved for New Mexico in the '68 legislation. Is that an accurate representation of the situation as you see it?

Mr. NARCIA. I believe you are correct. We have been working very extensively with the State of New Mexico. Our negotiators have met with Governor Richardson and Mr. D'Antonio and his staff and we are working very hard to resolve the issues that we have been dealing with, and I think that would be an accurate statement, Senator.

Senator BINGAMAN. Okay. Thank you very much, Madam Chair.

Senator MURKOWSKI. Senator Kyl.

Senator KYL. Thank you.

If any of the panelists would like to respond to what I say, they are welcome to do so. I simply want to thank all of you for being here and for testifying. It is evident from the testimony of at least two of the witnesses here that this is an extraordinarily important settlement for their future. With regard to the Navajo Nation, President Shirley and I have talked about this and it is my very fervent hope that, using the funds and water available that would be created by this settlement, we can move forward quickly to resolve the claims of the Navajo Tribe and also develop the projects necessary the satisfy in a real way the claims that the Navajo have.

It is complicated by the fact that we are dealing with an upper basin and a lower basin and a New Mexico and an Arizona component. But I think that President Shirley is absolutely right that one of the first things the Navajo need is to get a water supply to Window Rock. So there is no disagreement among us, I think, about what needs to be done. It is a matter of timing and calibrating all of this so that we can get it done in the appropriate way, and I pledge to continue to work with you, President Shirley, and appreciate the remarks that you made.

To Chairwoman Kitcheyan, first let me say you could have said much more and your long statement reflects much more that is worth reading. The U.S. Government did not treat the San Carlos Apache Tribe well and there are many things that you could have said about that. And that is part of the backdrop of this hearing today. It is part of the reason why, on behalf of your people, I know that you have to be very careful about negotiations and making concessions that you think are inappropriate under all of these circumstances.

I also want to say that the things you said about what is really important to the San Carlos Apache people I know, I have witnessed. There is no group in the country that has greater pride in the service of its young men and women in our military than the San Carlos Apache Tribe. I was honored to be grand marshal of the parade.

By the way, it rained on the day that I was there. So maybe you want to think—maybe I should come back again.

So I note the difficulty that these issues have presented. You have very competent legal advice from your counsel. You are committed to doing the right thing on behalf of the San Carlos Apache Tribe. You have recognized the difficulty and told us of that. It is just my hope that as we move forward we can continue to negotiate and that we will find a way to satisfy the requirements of the San Carlos Apache Tribe and treat the tribe in a way that is fair and equitable and also get an agreement in time actually to be included within this overall settlement. If we can do that, I think it will be to the advantage of everyone. But it cannot be done unless you are satisfied that it is fair and we recognize that.

I again thank all of you for being here. Governor Narcia has been—I do not know how many meetings we have attended together, but it takes a huge amount of effort to get these settlements done and I just appreciate everybody that is on the panel, but also all of the people behind you who have spent so many hours working on this as well.

Thank you, Madam Chairman.

Ms. KITCHEYAN. Madam Chair, may I please say something?

Senator MURKOWSKI. Yes, please.

Ms. KITCHEYAN. I want to say thank you to Senator Kyl and also for the comments that you made. But you know, it is important to everyone's future, not just to two tribes. And next time you meet with Governor Narcia, please take me along.

Thank you.

[Laughter.]

Senator MURKOWSKI. I thank you all. I thank you for your representation here today on behalf of your tribes, your community, your nation, and appreciate the testimony from all of you.

Thank you.

Mr. NARCIA. Thank you.

Mr. SHIRLEY. Thank you.

Senator MURKOWSKI. We now move to our third and final panel, representing the two States who have interests in the legislation before us: Mr. Herb Guenther of the Arizona Department of Water Resources and Mr. John D'Antonio, the New Mexico State Engineer.

Gentlemen, good morning. Welcome to the committee. Mr. Guenther, I recognize you from our previous lives, I think. I was looking at you trying to figure out where it was, but State legislatures.

Mr. GUENTHER. Yes, Madam Chairman, that is correct. The Council of State Governments.

Senator MURKOWSKI. That is right, that is right. It is nice to see you here today. That is right. Good to see you.

All right, if we can proceed then with you first, Mr. Guenther, with the Arizona Department of Water Resources.

STATEMENT OF HERBERT R. GUENTHER, DIRECTOR, ARIZONA DEPARTMENT OF WATER RESOURCES, PHOENIX, AZ

Mr. GUENTHER. Thank you, Madam Chairman and Senator Bingaman and Senator Kyl. I am here, of course, on behalf of Governor Janet Napolitano, who would have also liked to have been here, but was unable to do so today. I will ask that her comments be inserted into the record in full.

Senator MURKOWSKI. They shall.

Mr. GUENTHER. This obviously is a momentous occasion. You have heard all of the importance that this particular agreement brings to the Southwest and especially to Arizona. There also are parts that are still growing and are developing as we speak. The State of Arizona is very supportive of this settlement in all its aspects, including those which are still developing.

While some have said it is 14 years in the making, I know that some who have been instrumental in this settlement agreement have been working on it their entire lives. In excess of 30 years of adult life have been invested in portions of this settlement.

Certainly by the sheer number of participants in this settlement it is a very precarious and delicate balance that we seek to maintain, if you will a house of cards that is in a very delicate position. It has so many working parts that when you touch one its impacts can reach many.

One of the major benefits that we see in Arizona is the ability to a stipulated settlement of some very longstanding litigation, certainly a benefit from the timeline of our biological time scale that we all are faced with as humans.

Other aspects of this settlement that make it extremely important to Arizona is the surety it provides, the predictability with regard to Gila River resources, the ability to bring those resources back within some modicum of reality, as well as the reliability that those resources will provide both to the tribes in the settlement and the many cities and water companies that also participate in the settlement.

I think the realism of this particular settlement has yet to reach full understanding. While there are outstanding issues we will continue to work toward, there are hordes of benefits to entities that have chose to be combatants for years and years and I think now will have the opportunity the sit side by side and enjoy the privileges that this settlement will afford.

With that, Madam Chair, I think I will reserve sufficient time for questions that might be pressing. We will continue to work with the Navajo Nation, we will continue to work with the San Carlos Apache, and we will continue to work with the State of New Mexico

toward resolution of their issues as it relates to the 1968 right to the Central Arizona Project.

I thank you.

[The prepared statement of Governor Napolitano follows:]

PREPARED STATEMENT OF HON. JANET NAPOLITANO, GOVERNOR, STATE OF ARIZONA

Chairman Murkowski, Chairman Campbell, and members of the committees, good morning, and thank you for the opportunity to present the views of the State of Arizona on S. 437, the Arizona Water Settlements Act of 2003.

It is now time for Congress to confirm the agreements reached after many years of intense negotiations and compromise. With passage of S. 437, and implementation of the settlements, Arizona will embark on a new age of water resource planning, usage, and cooperation.

The legislation encompasses multiple Titles to resolve many longstanding water disputes in Arizona. Additionally, it provides benefits to New Mexico. Each Title addresses a particular settlement agreement, and provides the congressional authorization and funding needed to implement the settlement. Many times in the past, Congress has been faced with enacting legislation to authorize settlements that have not been finalized. I am pleased to inform the Committee members that the three settlement agreements to be "authorized, ratified, and confirmed" by act of Congress have been executed by the State of Arizona, the tribes, and nearly all of the non-Indian parties, except the Secretary of the Interior. The Secretary requires congressional authorization prior to signing the settlements. There is no question that the parties intend to settle the issues, and in fact many of the parties are carrying out their government functions as if the settlements were already final.

This legislation is vitally important to the future of Arizona, in economic terms, in meeting water management goals, and in furthering our relations with our tribal citizens. S. 437 will provide the mechanisms to resolve two major tribal water settlements immediately, and will provide the United States and non-Indian parties additional tools to resolve water rights claims of other Arizona tribes. It establishes a means for acquiring water and funding for future tribal water rights settlements.

Let me provide some highlights of each Title and why each is so important to all the people of Arizona.

TITLE I: CENTRAL ARIZONA PROJECT SETTLEMENT

Since statehood in 1912, Arizonans have dreamed of bringing Colorado River water to the cities and farms of central Arizona. It was the great Senator Carl Hayden's dream. The recently deceased John Rhodes, former House minority leader, claimed passage of legislation to authorize the Central Arizona Project (CAP) as his greatest achievement in his 30 years in Congress. The CAP authorization became a reality in 1968 and by 1985 the CAP was delivering Colorado River water to farms and communities, as a replacement for groundwater. It continues to be our lifeblood, allowing many Arizonans to weather the drought conditions of eight of the last nine years. We continue to enhance the use of CAP, and this legislation furthers the State's water management goals utilizing the CAP.

Title I is consistent with and in furtherance of the intent of the stipulated settlement approved by the U.S. District Court of the litigation between the United States and the Central Arizona Water Conservation District (CAWCD) over the amount of repayment for the CAP. This Title also resolves other non-contract issues between the United States and the non-Indian CAP water users. Further, Title I provides the means to acquire the water supplies and funding necessary for the settlements in the other Titles of S. 437, and for future tribal water settlements.

Final division of the Colorado River water for the CAP between the state users and the federal users is important to the State. With this legislation, approximately 47% of the CAP will be dedicated for use by Arizona Indian tribes. The rest has been or will be allocated among the many Arizona non-Indian municipal, industrial, and agricultural users. As part of Title I, 65,647 acre-feet of CAP high priority rights will be reallocated to Arizona cities, towns, and water companies for municipal and industrial use. This reallocation has been pending for years after an extensive public process by the Arizona Department of Water Resources.

To acquire water for tribal water settlements, Title I provides a mechanism for agricultural interests to relinquish their CAP subcontracts in return for debt relief from section 9(d) of the Reclamation Project Act of 1939 totaling $158 million (shared by the federal government and state interests). Additionally, Title I provides for waivers of water rights claims by certain Indian tribes, and regulatory relief from the Reclamation Reform Act (RRA). It is important to the State that the water

for tribal settlements, over and above that contributed by the parties, be acquired water from willing rightholders and not water taken by the federal government. Early tribal settlements were based on this concept, but in the 1990s the Secretary and Congress allocated water for settlements despite concerns raised by the State. We hope that the provisions of Title I can be a precedent for settlements throughout the country.

The 1982 Reclamation Reform Act (RRA) has prevented the State from making full use of the CAP, which was designed to replace existing groundwater use for agriculture. Some lands are not eligible to receive CAP water due to RRA and are instead still irrigated with groundwater. Additionally, the administrative costs of implementing RRA in Arizona outweigh any perceived benefits to the government. The relinquishing districts would then be able to purchase CAP water over the next 30 years from year-to-year agriculture pools at an affordable price. RRA relief for the agricultural districts within the CAP service area, as provided in Title I, furthers implementation of the Arizona Groundwater Code, and our effort to preserve our depleted groundwater supply for future generations.

The water acquired pursuant to the CAP agricultural subcontract relinquishments will be used in the water budgets for the Gila River Indian Community settlement in Title II, for the Tohono O'odham Nation settlement amendments in Title III, and provide the Secretary of the Interior with additional water for future Arizona tribal water settlements, for a total of 197,500 acre-feet of water. Up to an additional 96,295 acre-feet will be provided for the State to hold in trust for a period of time and then reallocate to municipal and industrial water users in Arizona.

Title I also authorizes an agreement between Arizona and the Secretary to share in the "firming" of 60,648 acre-feet of the tribal CAP water to make it a more reliable water source for tribes to use for municipal and industrial purposes. Firming is the process of storing water underground today to be used when the dedicated surface water supply is lacking due to shortages. The State is obligated to firm 15,000 acre-feet for the Gila River Indian Community Water Rights Settlement, and another 8,724 acre-feet for future Arizona Indian tribal settlements. Through the Arizona Water Banking Authority we have begun a process to identify the best ways to meet this obligation, and to examine whether additional state law authorizations are needed, as well as funding options.

Arizona has been concerned in the past about proposals to market water out of state, in derogation of the Law of the River, the Indian non-intercourse acts, and other applicable laws. The Law of the River includes several U.S. Supreme Court decisions, two multi-state compacts, and numerous acts of Congress concerning the use of the Colorado River. We believe that uses of the Colorado River must be consistent with this body of law.

Title I clearly prohibits the direct or indirect marketing of CAP outside the boundaries of the State of Arizona. However, it would not impact the existing interstate banking agreements with California and Nevada through the Arizona Water Banking Authority. Nor would it affect any exchange necessary for the New Mexico Unit of the CAP as authorized in 1968. The State has been negotiating with the State of New Mexico over proposed changes to confirm that New Mexico can develop the CAP New Mexico Unit as envisioned in the 1968 Act.

Funding of tribal water settlements has been a problem in the past. Tribes are asked to give up potential large paper water rights in return for a reasonable water budget and the ability to make use of the water. Use of water involves development funds for on-reservation projects. As you know, the appropriations process is difficult and may continue to be so in the future.

Title I outlines the intended uses for the Lower Colorado River Basin Fund (Fund) over the next 40 years. The Fund consists of payments by the non-Indian CAP water users and power revenues of the CAP. These sources will continue to flow into the Fund until the CAP is fully repaid. Under Title I, the revenues in the Fund are redirected to be used to reduce the cost of delivery of water to tribal water users, to finance current and future tribal water settlements and to finance CAP distribution systems on tribal lands. It is important to note that this funding is for the long-range water and economic development needs of Indian tribes.

Other issues resolved in Title I include clarifying that CAP contracts, whether tribal or non-Indian, are for permanent service within the meaning of the Boulder Canyon Project Act and for a term of service of 100 years. It also resolves the long-standing dispute between the Secretary and CAWCD about how shortages will be shared by users of the CAP.

The provisions of Title I have been memorialized in the Arizona Water Settlement Agreement (Agreement), among the CAWCD, the Director of the Arizona Department of Water Resources, and the Secretary of the Interior. CAWCD and the Director signed the Agreement last year, but the Secretary will need to complete the Na-

tional Environmental Policy Act process before signing. Finishing the Agreement will further the stipulated settlement of the repayment litigation in U.S. District Court, which could not be completed without passage of S. 437.

TITLE II: GILA RIVER INDIAN COMMUNITY WATER RIGHTS SETTLEMENT

Coronado visited the Pima Indians of what is now central Arizona in 1540. There the conquistador bought grains from lush tribal fields along the Gila River. The current Gila River Indian Community (Community), made up of two tribes, the Pima and the Maricopa, are the descendents of those Indians visited so long ago by Spanish explorers and missionaries. These tribes assisted the U.S. Cavalry in the Indian wars, sold grain to American settlers, and its members have volunteered to serve in many overseas conflicts. One such member was Ira Hayes who helped raise the United States flag over Iwo Jima.

With a history of farming they have fought in the courts for decades for their water rights. Over the last two decades negotiations have been held. In the last year we finally succeeded in reaching a settlement. Title II would authorize the Secretary to sign the Gila River Indian Community Water Rights Settlement and provide the ways and means needed to make it a reality.

The State participated in this settlement in many roles, that of facilitator, water rights holder, and protector of state policies and interests. Additionally, the State attempted to make the settlement acceptable for small water users unable to represent themselves in the negotiations. After enactment of the congressional settlement legislation, Arizona must address and enact changes to Arizona law consistent with the settlement to bind all citizens to the settlement, now and in the future. A State does not commit lightly to changing its laws, but in this case it will not only address issues presented by the settlement, but also serve the water management goals of the State. To this end the Arizona Department of Water Resources, the Arizona Game and Fish Commission and the Arizona State Land Department represented the State in negotiations. I will outline the State's policy considerations.

A major goal of any Indian water rights settlement is finality. Title II confirms an overall final water budget for the Gila River Indian Community and provides strict accounting of that budget, funding to allow utilization of the water, and broad waivers of claims by the Community and the United States as trustee to pending and future court claims to water rights.

In the General Stream Adjudication of the Gila River and its sources, the Community and the United States claim between 1.5 million and 2 million acre-feet of water from all sources. The Gila River bisects the Community, which has proven uses of Gila River and groundwater since before recorded history. It is not a matter of whether the Community is entitled to water; it is a question of how much.

In the settlement, the Community has agreed to an overall water budget of 653,500 acre-feet annually, calculated on a rolling average over 10 years. The sources of the water are Gila River water, Salt/Verde River water, groundwater, exchanged reclaimed water, and Central Arizona Project (CAP) water. Well over one-half of the proposed water budget is currently under the legal control of the Community. It has a CAP contract for 173,100 acre-feet, a time-immemorial right to over 200,000 acre-feet Gila River water under the Globe Equity decree (125,000 acre-feet of reliable water in the tribal water budget), 5,900 acre-feet of Salt/Verde River water under the Haggard Decree, and the sovereign right to pump their own groundwater outside of State regulation. Part of this settlement is recognition of rights already held and used by the Community, with methods to improve those existing uses. Attached to my statement is an outline of the Community settlement water budget.

The primary source of additional water for the Community's water budget is CAP, with some contributed Salt/Verde River water and exchanged reclaimed water. Some parties contribute CAP water, but the largest block is from the CAP subcontract relinquishment pool established under Title I, approximately 102,000 acre-feet of lower priority water used for agriculture. The final piece to the water budget came from creative thinking by the Phoenix area cities. The cities of Mesa and Chandler will exchange highly treated reclaimed water with the Community for Community CAP water on a 5 to 4 ratio. This creative thinking solves several water management issues and benefits Indians and non-Indians. In fact, the two cities have already entered into the agreements necessary to make the exchange, beginning the construction process prior to enactment of this legislation. The Community and the United States are prohibited from seeking water above the proposed water budget.

In exchange for this water budget and funding to make use of the budget, the Community and the United States are granting broad waivers to all the citizens of

Arizona of past, present, and future court actions on water rights, subject to some retention of rights to enforce the benefits of the settlement. Arizona insisted that this be a final settlement of the Community's claims to water.

A benefit to settlements is to make partners out of combatants. An example of this, to be confirmed in the settlement, is the relationship between the Gila River Indian Community and the San Carlos Irrigation and Drainage District (SCIDD). SCIDD and the Community share in the San Carlos Indian Irrigation Project run by the Bureau of Indian Affairs. Sharing water of a project operated by an underfunded federal agency has strained the relationship. Through the settlement, SCIDD and the Community will enter into a new relationship, dividing the project features and taking over responsibility for operating their own systems. The settlement also provides funding to rehabilitate the existing unlined system to make better use of limited water supplies. SCIDD and the Community now share common goals and work together as a team. This is but one example of how this settlement is making neighbors out of antagonists.

I will, at this point, list the parties to separate agreements (settlement, exchange, lease, or otherwise) that are part of the overall Community settlement confirmed by S. 437. The parties are:

- The Salt River Project;
- Phelps Dodge Corporation;
- The irrigation districts and many towns and cities in the Upper Gila River Valley and the San Pedro River, including New Mexico rightholders;
- Arlington Canal Company and the Buckeye Irrigation Company;
- Maricopa-Stanfield Irrigation and Drainage District;
- Central Arizona Irrigation and Drainage District;
- San Carlos Irrigation and Drainage District;
- The Cities of Mesa and Chandler;
- Arizona Game and Fish Commission;
- Phoenix area cities with leasing arrangements.

Some of these separate agreements further the water management goals of the State. For example, the ability of various cities to lease high-priority CAP water from the Community for 100 years is important in meeting Assured Water Supply requirements under state law for new subdivisions. The reclaimed water exchange agreements between the cities and the Community provide the Community with a reliable source of water for agriculture, and assist the cities in making full reuse of treated effluent.

The Upper Gila Valley settlements provide many benefits. Not only do the settlements end long-standing contentious litigation before the Globe Equity Court, between the large irrigation districts and the Community, but also provide a basis for future settlements. The irrigation districts have agreed to permanently reduce irrigation acreage for the benefit of the Community, and if there were a future settlement with the San Carlos Apaches, the districts would permanently reduce additional irrigation acreage. The irrigation districts have also agreed to a cap on combined diversions and groundwater pumping; real reductions in water use, to the benefit of the river's health, the Community, and the San Carlos Apache Tribe.

In past Indian settlements, States have been asked to make financial contributions to settlements. In previous Arizona Indian tribal water settlements, the State has provided an appropriation to the tribal development fund. The State's contribution to the Community settlement is structured differently. First, the State believes that the CAP water that is being relinquished is a state contribution. It was originally part of the non-Indian allocations of the CAP. We have agreed to this division of water in Title I and urge its use for the Community's settlement. The financial aspect for the State in this settlement may be large as time goes by, but it does not include any contribution to the Community development. Instead the State has agreed to firm up to 15,000 acre-feet of low priority CAP water. Title I outlines this commitment but leaves the details to a future agreement with the Secretary about firming of tribal supplies through the Arizona Water Banking Authority we are in the process of analyzing how this will be accomplished. It may involve millions of dollars to bank an amount necessary to firm the water to municipal and industrial delivery priority.

One of the separate agreements involves protection of groundwater in the areas south of the Gila River Indian Reservation. By changes to state law, the State will limit the use of groundwater in specific areas adjacent to the reservation to help protect tribal groundwater. To further ensure that the restrictions benefit the aquifer for the Community, the State will authorize and supply a water replenishment bank. The settlement outlines the goals of the replenishment bank but leaves implementation up to the Arizona Legislature. By enacting state legislation we will bind

all future water users in that protected area to the settlement. This replenishment bank may involve millions of dollars.

Water uses in other areas within the Gila watershed are also of concern to the Community, including groundwater users along the San Pedro River and the Upper Gila River. The water budget makes assumptions about the present flow of the Gila and San Pedro rivers. The State has proposed that present uses on those streams should be allowed to continue and the Community has agreed. The settlement proposes a "safe harbor" provision for these current uses that the Community, SCIDD and the United States would not challenge. To limit future uses, the State has agreed to propose changes in state law that prohibit the construction of new dams and the development of new irrigation uses within the San Pedro River and the Upper Gila River basins. When enacted the State assumes an ongoing enforcement responsibility. At this time we do not have an estimate of this future financial commitment.

To summarize: the State contributions involve several changes in state law to accomplish the goals of the settlement; obligate the State to ongoing enforcement provisions, and necessitate large underground water storage expenditures for firming of tribal water and for the replenishment bank.

This settlement encompasses many good things for many entities within Arizona. I have touched only on those of particular importance as State policy considerations. However, I must comment on one more provision. In Title II, and in Title III, the legislation outlines procedures for the Gila River Indian Community and the Tohono O'odham Nation to have lands placed into trust.

It is important to remember that 28 percent of Arizona's total land base consists of various Indian Reservations, with much more land held in trust for benefit of tribes or individual Indians, or in fee by tribes. We are proud of our tribal governments and have improved our ability to work with them on a government-to-government basis, especially on health, education, and gaming issues. However, there are many consequences to state and local non-Indian authorities when lands are added to reservations, or taken into trust. For many years the State has taken the position that only Congress has the authority to make new reservations or additions to existing reservations, pursuant to congressional directives found in 25 U.S.C. 211. Some tribes and the Secretary of the Interior disagree with our legal analysis. To circumvent future litigation on this issue we, along with other Arizona interests including the congressional delegation, have urged that the settling tribes agree to a clarification of this issue concerning their reservations.

Title II confirms that new additions to the reservation, or the placing of lands into trust status for the benefit of the Community, will only be accomplished by specific acts of Congress. Congress enacted the Zuni Indian Tribe Water Settlement Act earlier this year with similar provisions. We strongly support retention of this provision in Title II, as well as in Title III.

In summary, the Gila River Indian Community Tribal Water Settlement provides many benefits to all Arizonans, and the State has committed itself to changes in state law and future use of resources to effect the benefit of the settlement for the Community.

TITLE III: AMENDMENTS TO THE SOUTHERN ARIZONA WATER RIGHTS SETTLEMENT ACT OF 1982

In 1982, Congress enacted the Southern Arizona Water Rights Settlement Act (SAWRSA) to resolve the tribal claims against non-Indian water users in the Upper Santa Cruz Basin by the Tohono O'odham Nation (Nation), then known as the Papago Tribe, pending in the case *U.S. v. Tucson.* The 1982 SAWRSA called for a water budget of 66,000 acre-feet of delivered water, a 10,000 acre-feet limit on groundwater pumping by the Nation, a $15 million development trust fund, and a cooperative fund to pay for the delivery of surface water.

Portions of the settlement have been completed, including the construction of a major portion of the distribution system to use the Nation's original CAP allocation. The Nation, the State, and the local entities have performed their required tasks under the 1982 Act. This included state entities' financial contributions of $5.25 million, Tucson's contribution of 28,200 acre-feet of effluent and tribal waivers of claims to water rights.

However, issues about the distribution of the tribal benefits arose before final dismissal of *U.S. v. Tucson.* At the same time, questions were raised about the source of a portion of the tribal water budget, and opposition formed to the building of a new farm on unbroken desert lands. Title III of S. 437 would amend the 1982 Act to address these issues, provide a better method for dismissal of the pending lawsuits, and modernize the authorized uses of water by the Nation to be more con-

sistent with those allowed under state law. It also confirms the settlement agreement among the Nation, the State of Arizona, Asarco, an international mining company, and Farmers Investments Companies (FICO). I recently signed the settlement agreement, as have all parties except the Secretary of the Interior, who is awaiting congressional authorization.

To begin the more recent negotiations with all parties to the settlement, an agreement was reached between the Nation and the Indian allottees, whose allotment lands are within the basin, about the use of the settlement benefits. It is a tribute to the tribal parties that they have worked out internal differences, and now are ready to finish the settlement. The State acted as a party to the final settlement and facilitated the negotiations.

Title III clarifies all the issues that delayed implementation. First, it identifies the source of the additional settlement water. The Nation has an original CAP allocation of 37,800 acre-feet, but SAWRSA provided for an additional 28,200 acre-feet of unidentified settlement water. Under Title I of S. 437, CAP agricultural water is made available to the Secretary for Indian water settlements, and it is from this pool of relinquished contracts that the Nation will receive its full settlement budget. Title I directs that the Secretary will have the responsibility to firm the 28,200 acre-feet of settlement water. The State offered up to $3 million in appropriations or services to assist the Secretary in that obligation. It should be noted that the State had already appropriated a contribution to the Cooperative Fund as required under the 1982 Act, and this $3 million is an additional contribution.

The settlement better defines the nature of the 10,000 acre-foot limit on pumping rights. The 1982 congressional directive on the limitation of pumping did not address whether this is a "reserved" pumping right or the equivalency of a state-based grandfathered pumping right in an active management area. In return for clarifying that this is not a reserved right the State has agreed to seek state law changes to allow additional protection to the Nation's groundwater resource from the effects of new wells around the reservation. Under this legislative change, the State adds to its water management responsibilities in the Tucson Active Management Area.

Each of the major parties, the City of Tucson, Asarco, and FICO, have entered separate agreements with the Nation and the allottees to further protect the groundwater resource of the reservation. This includes a creative solution by Asarco to substitute tribal CAP water for Asarco's industrial groundwater use through a storage arrangement.

Waivers and releases under the 1982 Act only provided for past and present claims to water rights and injuries to water rights, while the Title III amendments include future claims to water rights and injuries to water rights with some defined exceptions to enable the parties to enforce the settlement provisions.

In 1982, it was envisioned that the Bureau of Reclamation would construct or rehabilitate three different farm units for the Nation. Under Title III, a procedure is outlined to substitute a $18.3 million development fund for one farm that would have been built on unspoiled desert lauds. The $18.3 million is a present value substitute for a project already authorized as part of a settlement and committed to construction. Of the remaining commitment, one farm is already completed, and the last farm rehabilitation and expansion project has begun, both using CAP funding.

A procedure for dismissing the pending lawsuits is agreed upon in the settlement agreement, and confirmed by Title III. It provides for class action consolidation and dismissal of Indian allottee claims based on the receipt of settlement benefits. There are over 3000 individual Indian allottees with land interests in the basin. The State finds that this procedure gives greater certainty, binding not just the present litigants but also their successors.

In summary, Title III provides better tools for dismissal of pending lawsuits, a confirmed supply of settlement water for the Nation, protection of tribal groundwater, creative uses of CAP water, and legal certainty over issues not addressed in 1982, such as the nature of the groundwater pumping right.

TITLE IV: SAN CARLOS APACHE TRIBAL WATER SETTLEMENT

Unfortunately, at this time we do not have a San Carlos Apache tribal water settlement. Congress approved a San Carlos Apache Tribe water settlement of their claims to the Salt River watershed portion of the reservation in 1992. Since that time, several discussions have been about resolving the tribe's claims to the Gila River watershed portion of the reservation. These issues are also being addressed in the General Stream Adjudication of the Gila River and its source.

The State stands ready to assist in the negotiation of the San Carlos Apache tribal claims to the Gila River when the Tribe and the United States reach an understanding of the parameters of such a settlement. It is possible that a settlement will

be reached before passage of S. 437. However, the State does not believe that the rest of legislation should be delayed if Title IV cannot be completed.

Provisions have been made in Title II to maintain the rights of the San Carlos Apache Tribe against the settling parties. The San Carlos Apache Tribe expressed concerns to the State that the legislation and the settlement agreement for the Gila River Indian Community hinder use of their current water rights. They cite primarily the exchange provisions in the Community's settlement, and the legislative changes proposed by the State of New Mexico, both in Title II. Under the Globe Equity decree of 1935 the Apaches were awarded a water right with an 1846 priority date to irrigate 1,000 acres along the Gila River. The State fully supports maintaining the ability to use this right, and in fact, would support proposals to enhance the ability of the Apaches to make use of the 1846 right.

The State is optimistic that the Apache claims to the Gila will be resolved in the not too distant future, either by settlement or in Adjudication Court, but urges the Committee to move forward on S. 437, with or without a new Apache settlement.

SUMMARY AND CONCLUSION

Before closing I would note that there are concerns that have been raised by non-parties to the settlements. Most notably the Navajo Nation, in its endeavor to quantify its water rights, has offered comments. Their primary concern is that the Navajo Nation claims have not been considered in this legislation. The State of Arizona is currently negotiating with the Navajo Nation about its claims to the mainstem Colorado River. It is our hope that a portion of the water acquired pursuant to the relinquishments authorized in Title I will be available for settling their claims.

Title I provides the final division of the Colorado River waters to be delivered through the CAP, clarifies contractual relationships with the United States, authorizes a shortage-sharing approach, and furthers the intent of the stipulated settlement between Central Arizona Water Conservation District and the United States on repayment of construction costs of the CAP. Presently unallocated CAP water is finally allocated or reallocated pursuant to public processes completed many years ago. Finally, Title I provides a mechanism for relinquishment of agricultural priority water to be used for Indian water settlements, both present and future, along with a funding mechanism for those settlements and for the delivery of CAP water to Indian customers. The funding mechanisms proposed through the Lower Colorado River Basin Fund may be unique, but they, are worthy of congressional approval. These benefits accrue primarily to Arizona Indian tribes and their future economic development.

Title II confirms the water rights settlement of the Gila River Indian Community, ending long-standing judicial and cultural conflicts concerning millions of acre-feet of water. It provides the Community with a clear final water budget and the resources to utilize that water in return for complete waivers and releases of water rights claims and injuries to water rights. Many of the settlement's features enhance the ability to conserve groundwater in central Arizona, including the leasing of tribal CAP supplies to non-Indian users in Arizona. Title II resolves potential legal disputes over how non-tribal lands gain trust or reservation status by confirming that it is properly Congress' role to determine if and how reservations are changed. The State has committed to pursue changes in state law and to expend millions of dollars to assure the Community more reliable water supplies and to preserve groundwater on and around the reservation.

Title III provides means to finalize a settlement long overdue for the Tohono O'odham Nation and the people of southern Arizona. It modernizes the 1982 settlement, providing water use flexibility, especially of CAP water. In seeking additional protections of tribal groundwater, the settlement complements existing state water management goals. The effort in amending the settlement gave tribal, local, state, and federal government representatives an opportunity to better understand each other and to become partners instead of combatants.

We have worked long and hard to negotiate the three settlements represented by the respective Titles, and the State of Arizona strongly recommends that the Committee support S. 437, the Arizona Water Settlements Act of 2003.

COMMUNITY'S WATER RIGHTS

The Community and the United States shall have the following rights to water, which shall be held in trust by the United States on behalf of the Community:

Source	Amount (AFY)	Reference
Underground Water	156,700	as set forth in Paragraph 5.0
Globe Equity Decree Water	125,000	as set forth in Paragraph 6.0
Haggard Decree Water	5,900	as set forth in Paragraph 7.0
Community CAP Indian Priority Water.	173,100	as set forth in Subparagraph 8.3.1
RWCD CAP Water	18,600	as set forth in Subparagraph 8.3.3
RWCD Surface Water	4,500	as set forth in the RWCD Agreement
HVID CAP Water	18,100	as set forth in Subparagraph 8.3.5
Asarco CAP Water[1]	17,000	as set forth in Subparagraph 8.3.4
SRP Stored Water[2]	20,000	as set forth in Paragraph 12.0
Chandler Contributed Reclaimed Water.	4,500	as set forth in Paragraph 18.0
Mesa Reclaimed Water Exchange Premium.	5,870	as set forth in Paragraph 18.0
Chandler Reclaimed Water Exchange Premium.	2,230	as set forth in Paragraph 18.0
New CAP NIA Priority Water	102,000	as set forth in Subparagraph 8.3.2
TOTAL	653,500	

[1] Subject to completion of ongoing negotiations between the Community and Asarco.
[2] SRP has conditionally agreed to provide an average of five hundred (500) AFY of Blue Ridge Stored Water to the Community pursuant to Subparagraph 12.13. In the event the conditions in Subparagraph 12.13.1 are satisfied, the amount of water listed in Subparagraph 4.1 to be provided by SRP shall increase to twenty thousand five hundred (20,500) AFY and the amount of Underground Water listed in Subparagraph 4.1 shall be reduced to one hundred fifty-six thousand two hundred (156,200) AFY.

Senator KYL [presiding]. Senator Murkowski stepped out momentarily, so I will take the chair for a second. Senator Bingaman, the floor is yours.

Senator BINGAMAN. Mr. Chair, did you want to go ahead and hear from John D'Antonio first?

Senator KYL. That might be better because we could join at least those two issues together. So, Mr. D'Antonio, if you would like to go ahead and make your comments now, then we will just combine both of you for our questions.

STATEMENT OF JOHN D'ANTONIO, NEW MEXICO STATE ENGINEER, SANTA FE, NM

Mr. D'ANTONIO. Mr. Chairman, thank you, committee members. My name is John D'Antonio. I am the State engineer for New Mexico and I very much appreciate the opportunity to appear before you today and provide comments on behalf of the State of New Mexico regarding the Arizona Water Settlements Act, S. 437.

This legislation will resolve longstanding water issues among Indian tribes and water users in New Mexico and Arizona. It is of great importance to the State of Arizona and it will bring numerous benefits to water users and communities in the Gila River Basin. I commend Senator Kyl for introducing such comprehensive and much-needed legislation.

In addition to the benefits to Indian tribes and water users in Arizona, this bill could benefit western New Mexico, which shares the Gila River with Arizona. Both titles 1 and 2 of the bill—both title 1 of the bill, the Central Arizona Project Settlement Act, and title 2, the Gila River Indian Community Water Settlements Act, bear directly on use of the water within the Gila River Basin in New Mexico.

During the last year we have worked with representatives of the State of Arizona, Indian tribes, and water users to craft language that will address New Mexico's needs. We have made substantial progress and, if New Mexico's interests can be protected, we will be able to stand fully behind the bill.

New Mexico has two discrete areas of interest. First, in the Upper Valley Defendant, and that is referred to as the UVD's, the agreement provided in title 2 of the bill, we want to ensure that New Mexico farmers in the Verdant Valley are treated fairly. Second, the authorization of a New Mexico unit under section 304 of the 1968 Act authorizing the Central Arizona Project must be fully protected and advanced. I will discuss these two matters in turn.

Last year my office provided—participated in negotiating provisions of the UVD agreement. The core agreement calls upon the UVD's to reduce current irrigation by 3,000 acres in exchange for the ability to pump groundwater up to 6 acre-feet per year regardless of priority. The result in New Mexico is that water rights associated with up to 240 acres, which is about 8 percent of the currently irrigated acres in the Verdant Valley, would be extinguished.

The State of New Mexico believes the UVD settlement in Senator Kyl's bill is a fair and reasonable compromise that will protect all parties and provide a more secure and dependable water supply. We support implementing the UVD settlement.

Our second concern is to carry out the authorization of the New Mexico unit of the Central Arizona Project as provided in the 1968 Act. The U.S. Supreme Court decree limited the State of New Mexico to present and past uses of water. The 1968 act authorized an apportionment to New Mexico as part of the CAP. The intent of the 1968 Act is to provide for future uses of water in New Mexico from the Gila River Basin above those specified in *Arizona* v. *California.*

The 1968 Act directs the Secretary of the Interior to provide New Mexico with its additional water through an exchange by which the Secretary would contract with water users in New Mexico for water from the Gila River Basin in amounts that will permit the consumptive use of water not to exceed an annual average of 18,000 acre-feet, including reservoir evaporation, over and above the consumptive uses provided for by article 4 of the decree in *Arizona* v. *California.*

To complete the exchange, the 1968 Act also directs the Secretary to deliver CAP water to users in Arizona in sufficient quantities to replace in full any diminution of Gila River water supply that results from the additional consumptive use of Gila River water in New Mexico. Amendments to S. 437 are required to ensure New Mexico's ability to construct the New Mexico unit and develop the 18,000 acre-feet. Over the last 9 months we have been working with the State of Arizona, Bureau of Rec, Bureau of Indian Affairs, the Gila River Indian Community, the San Carlos Irrigation and Drainage District, and the Central Arizona Water Conservancy District to provide necessary amendments and related settlement documents to facilitate construction and operation of the New Mexico unit of the CAP.

The following issues and tasks, have been—the following issues and tasks have been or remain to be resolved in whole or in part between Arizona and New Mexico in relation to the 18,000 acre-

foot exchange: Number one, New Mexico's initial concern was the Arizona Water Settlements Act would prohibit the exchange of CAP water for New Mexico's additional diversion of Gila River water. This issue is resolved.

Progress is being made on terms and conditions that will incorporate into the exchange agreement between New Mexico, the Gila River Indian Community, and the Secretary of the Interior to effect the exchange provided in the 1968 Act.

Number three, all parties are working to develop acceptable operational parameters that will allow New Mexico to divert water without causing economic injury or harm to holders of senior downstream water rights. General concepts have been proposed and technical review is scheduled. We are working hard to resolve this difficult and complex issue.

Number four, Globe Equity constraints may serve to contravene the intent of the 1968 Act to provide additional consumptive uses in New Mexico. Work is ongoing related to the following Globe Equity issues: A, to keep UVD users whole, accounting of storage in San Carlos Reservoir must include any water diverted by the New Mexico unit; and B, the ability of New Mexico to exchange without regard to the 1924 Federal storage priority in San Carlos Reservoir, as was assumed in Reclamation's 1982 and 1987 studies, must be confirmed.

Number five, as originally contemplated in the 1968 act, funding for the New Mexico unit is authorized as part of the CAP. While the original New Mexico project cost estimate was severely—was approximately $70 million, the estimate inflated according to the consumer price index results in a cost total of over $300 million in today's dollars. However, we believe we can build a suitable project for approximately $220 million, including increased costs to accommodate the Federal environmental mandates. Discussions are ongoing regarding what costs would be supported under this proposal.

Number six, several entities are seeking to exchange Gila River water for CAP water, a situation that could result in shortages of available Gila River water in some years. New Mexico has a senior exchange priority emanating from the 1968 act. Discussions and studies are under way to determine the amount of exchanges with which New Mexico would share priority.

Madam Chairman, we are working tirelessly to finish our negotiations with the State of Arizona, Indian tribes, and other water users. Once these discussions are complete and resolution of these issues can be incorporated into the legislation, we look forward to providing New Mexico's strong support for enactment of this bill by Congress.

Thank you again for the opportunity to present our views on this matter.

Senator MURKOWSKI [presiding]. Thank you both. We appreciate your testimony here this afternoon.

Mr. Guenther, throughout the hearings that we have had before this subcommittee, we certainly learned that in the West, groundwater pumping over many decades can deplete the groundwater resources which are connected to our river systems and the effects that this takes can sometimes be very difficult to realize or take decades to realize.

How confident are you that the groundwater pumping and other land use practices in the Gila and the Salt River Basin will not materially change the hydrologic conditions upon which all these settlements are based? If you can just kind of give me the details on your answer, that would be appreciated.

Mr. GUENTHER. Madam Chairman, I feel relatively certain that the continued use—the nice thing about groundwater in our Arizona in particular and certain areas of New Mexico is that it provides an excellent storage basin for being able to bridge the gaps in shortage years during our surface supplies. There is always a vacillation between groundwater and surface water use depending upon the local conditions of the watersheds and meteorological conditions that develop on a year to year basis. I would assume that that delicate balance would continue and that, while you would see swings in the use of surface water versus groundwater and vice versa, that there is no trend to suggest that one use would exceed the other.

One thing I would hasten to add is that in Arizona I think we have come to the realization that for all practical purposes groundwater is a non-renewable resource due to the smaller amounts of rainfall that we have, and that if we are going to use that resource we need to do so wisely and in a safe yield fashion, so that we do not eventually become dependent on a resource that will be gone some day.

But I am relatively confident, Madam Chairman, that the continued—the trend in usage will continue as it is now and that we will continue to try to build bridges over tribal litigation in the former settlements.

Senator MURKOWSKI. Thank you.

Mr. D'Antonio, the Upper Valley Diverters in the Verdant Valley of New Mexico, are they going to support this settlement and if so how would the settlement affect the water uses in the Verdant Valley?

Mr. D'ANTONIO. Madam Chairman, yes, the users in the upper valley, the Verdant Valley, are in support of this. The States worked closely with representatives of the Sunset Ditch and the New Model Canal regarding the UVD settlement and we have had several public meetings in the Verdant Valley, including domestic well users there, and they are in support of this agreement.

Senator MURKOWSKI. I have several other questions. I think what I will do, I also have some that Senator Domenici has submitted, and what I will do is submit these to be responded in writing.

Senator Bingaman.

Senator BINGAMAN. Thank you very much.

Let me ask Mr. Guenther first. As I understand what is being proposed here, the settlement included in this legislation contains this provision authorizing groundwater pumping up to 6 acre-feet per acre in the upper valley. This would seem to allow an increase in the depletion. However, in your statement you say that you see this resulting in real reductions in water usage. Could you explain how granting 6 acre-feet of water per acre can result in reductions in water use?

Mr. GUENTHER. Senator Bingaman, currently the use per acre is an unknown because it involves both a use of surface water as well as a use of groundwater, both of which are measured to less than an accurate degree. What this does is it has assumed a beneficial use which is typical for agricultural production of 6 acre-feet per acre combined use, we believe that, depending upon what the source of that original use was, whether it be groundwater or surface water, that this will in turn be in most cases a reduction in applied water.

But in addition to that, we are also retiring 3,000 acres of productive agricultural land at this time. So in essence you are retiring 18,000 acre-foot of water use there as well.

I hope that answers your question.

Senator BINGAMAN. Well, we really do not know what the amount of usage is at the current time, but we are assuming that, whatever it is, by going to 6 acre-feet per acre, we will still be seeing a decrease in water usage by virtue of the retirement of that 3,000 acres. Is that basically what you are saying?

Mr. GUENTHER. Yes.

Senator BINGAMAN. The Navajo Nation, you heard President Shirley describe the concern they have with section 104 that limits the existing authority that the Secretary of the Interior has to allocate CAP water to Indian tribes. Would the State of Arizona object to modifying this legislation in a manner that would preserve the Secretary's authority to allocate an amount that is needed to deal with the Navajo's concern for CAP water under this Navajo-Gallup project?

Mr. GUENTHER. Senator Bingaman, we would not object to that consideration. We would certainly like to be a part of putting the language together, because this is a very fine needle that needs to be threaded, and whether it is lower basin water for use in an upper basin or an upper basin use in lower basin, we need to make some wording adjustment there.

We have been working with the Navajo Nation and will continue to work with them in trying to identify sources of water for that, whether it be an allocation of the CAP, a purchase of a right on the main stem, or a potential CAP lease, are some of those areas that are currently being considered.

Senator BINGAMAN. Let me ask John D'Antonio. You heard President Shirley's testimony also on this section 104 limitation on authority of the Secretary of the Interior to allocate funds. Do you have a position or a view on that, which you would like to express or elaborate on here?

Mr. D'ANTONIO. Madam Chairman, Senator Bingaman, my feeling is that we do have and we are ongoing our separate Navajo negotiations within the State of New Mexico. The issues are pretty complex in terms that there is an upper basin Colorado and a lower basin Colorado and some of the water in the settlement that we are talking about with New Mexico is within the upper basin States and we treat the two basins much differently in terms of separate allocations.

In order for there to be any I guess dealing with the upper basin, you would have to deal with seven States, obviously, in looking at a different mechanism for water. Within our New Mexico section,

we are taking care of the Gallup, New Mexico, water issues through a proposed pipeline in our negotiations.

Senator BINGAMAN. Do you agree that there is a problem with us prohibiting the Secretary to allocate CAP funds, which is what one of the provisions in this proposed legislation is?

Mr. D'ANTONIO. Madam Chairman, Senator Bingaman, I think there would be a problem in restriction, just because water all over the West is pretty limited and it limits the flexibility in terms of going after what available water there is.

Senator BINGAMAN. Let me ask you about the same issue that I asked Mr. Guenther about. Are you satisfied that what is contemplated here with this 6 acre-feet per acre pumping being permitted, that this in fact does not impede New Mexico's ability to go ahead and use the Gila River water for its other needs, that we are not going to see an increased usage of water as a result of what is contemplated in the settlement here?

Mr. D'ANTONIO. Madam Chairman, Senator Bingaman, in New Mexico there is only about 8 percent of that water usage in the Verdant Valley in terms of drying up the 240 acres, which represents 8 percent of the total 3,000 acres. That is the only portion that is in New Mexico. It is not necessarily are we concerned about impairing New Mexico's water users, but there is a provision that we do not create any economic injury or harm to any of the downstream Gila River water users that have seniority status. So we are working closely with the State of Arizona in terms of coming up with operational parameters once that project is implemented to assure that there is not additional harm or economic harm to any of the downstream users.

Senator BINGAMAN. I will stop with that. Thank you, Madam Chair.

Senator MURKOWSKI. Thank you.

Senator Kyl.

Senator KYL. Thank you, Madam Chair.

Let me just make a couple of comments and again, if either one of you would like to respond—in fact, I am going to get into pretty deep water here if I speculate too much. So please correct me if I am wrong.

With regard to the most recent point that Senator Bingaman made and then also going back to a question of Senator Murkowski regarding use of groundwater, and in particular this use of a combination of surface or groundwater for 6 acre-feet, it is my understanding that in this particular area, because the groundwater is pumped very near the river and because of the soils involved, that there is a very quick recharge of the aquifer and the underflow of the river, and that is an additional factor, I think, that is somewhat unique to this area that is not that unique to the area around the Gila River Indian Community.

In other words, there is water taken out, applied to the land, and quickly finds its way back into the underflow of the Gila River. If I am incorrect on that, I think that are two water experts can tell me.

But with respect to an area in central Arizona like the area which is being farmed today in Pinal County adjacent to the Gila River Indian Community, one of the benefits of the settlement is

to get that pumping stopped or at least a large part of it stopped. That is one of the reasons why this 9-D debt is being forgiven, that those farmers would stop pumping water irrigating their lands and instead the Gila River Indian Community would accede to much of that water that is currently being used by the farmers in the area, non-Indian farmers, and that the damage to the aquifer of the Gila River Indian Community would then be ameliorated as a result of the fact that the farmers would no longer be pumping.

And in that area you do not have that really quick recharge. In fact, as Mr. Guenther pointed out, it is a very long time in certain areas. So it depends on which area of the State we are talking about with respect to recharge.

Then the other point I would like to make, I will go back and check—I do not think—I might be wrong in this, but I do not think the legislation limits the Secretary's authority to upper water—excuse me—upper basin allocations. If we are talking about an upper basin allocation for the Window Rock project, then that would be one thing.

But with respect to the lower basin allocations, the reason why I think it is important to retain the connection to Indian water settlements is that obviously we are taking an amount of water and setting it aside for Indian settlements and the object here is to resolve all of these competing claims. That is why it is important for the Secretary to be able to have that water available to apply to Indian water settlements.

If he were simply given or she were given the discretion to simply allocate water without those settlements, there could well not be enough water available for future Indian water settlements. Clearly, it was our intention that we have both a means of paying for and supplying water for those settlements.

So I think there would be a very strong objection to disaggregating the ability of the Secretary to make water available for Indian water settlements in the lower basin and to somehow provide an authority to allocate water outside of those settlements. If I am incorrect in that, then please correct me.

Mr. GUENTHER. Senator Kyl, I think you are very correct on those issues. But you did raise a point that I think I would like to help use to clarify, Madam Chairman, your question earlier. That is, do we see a change in type of use in these areas where these settlements are taking place? We are currently before—the Gila River is currently in an adjudication court. In that court, one of its highest priorities is going to differentiate between groundwater and surface water as to whether tributary sub-flows will be included or whether sub-flows in general would be included.

To the degree that the court identifies sub-flows of the river as surface water, what is now perceived to be groundwater usage could be in fact surface water uses, which then would require a surface water right which might not exist, and therefore we might be weaning considerable numbers of people from the use of groundwater in proximity to the main stem of these rivers that are being adjudicated, just for a point of clarification.

Senator MURKOWSKI. Thank you.

Senator Domenici, we have had a very good, very thorough hearing this morning, but do understand that you were occupied with

other committees. But if you would like to make any comments—I did have an opportunity to read your opening statement into the record, so that is there. But we have heard some very good testimony regarding the settlements. If you would like to make a comment or questions of either Mr. Guenther or Mr. D'Antonio at this time, it would be most welcome.

STATEMENT OF HON. PETE V. DOMENICI, U.S. SENATOR FROM NEW MEXICO

The CHAIRMAN. Well, I thank you. Thank you very much.

I have met with the New Mexico delegation yesterday, including the lawyer, who is a second generation lawyer. His father was a great lawyer in New Mexico. I told him his father was great, but I thought he was better. At least he was brief and articulate and very easy to understand. He said that he hoped his dad was that, too.

In any event, without too much time with them, but just doing a little bit of the background thinking, I come up with the conclusion that little old New Mexico is going to get her share of this pot of money to make sure that we get our 18,000 acres. And anybody that has in mind that this project is going through and we are not has it wrong, because we should have already had it paid for. It should have come out of the Colorado project clearly, from everything we read. As always seems to happen, at least two or three of the projects in New Mexico, they get left to the end.

But fortunately, before things finish somehow or another they find their way back to having to have us involved. So my statement was prepared to make sure everybody understood that, and I came today to make sure that the Senators that were here understood that, in particular that you, Senator Kyl, that you understand. It is an expensive project, and it is expensive for our little piece, but our little piece is absolutely a must, because when you leave New Mexico out of the big project and it comes back later and it costs money, you cannot excuse it on the basis that it costs too much.

So we will be supportive. I have been supportive of what you have been trying to do for 4 years and in the appropriations bill specifically helped. But now is the time when we see about others helping us.

So thank you very much. To the New Mexicans, I am very glad that you came to the hearing and that you were well-prepared, and I thank you for the strength of your intellectual concerns and presentations, and it was good to b with you. Thank you.

Senator MURKOWSKI. Senator Kyl.

Senator KYL. Madam Chair, might I just make it clear, for those of you what might not know, that what Senator Domenici said is absolutely correct. He has been—he also serves as chairman of the Energy and Water Appropriations Subcommittee, and that subcommittee has had to, for the last 2 years and then this year as well, include a provision which protects the source of funding here for future use if we are able to get this legislation adopted.

So he has already been helping to make this settlement work if we are able, ever able to get it passed. I have thanked him privately, but I will thank him publicly for his support again this year for making that possible.

The CHAIRMAN. Madam President, Madam Chairwoman, is the president of the Navajo Nation here?

Senator MURKOWSKI. Yes, President Shirley was here earlier.

The CHAIRMAN. Is he still here?

Mr. SHIRLEY. Yes.

The CHAIRMAN. President Shirley, I just wanted to say hello, thank you very much for coming, and we hope we can make this work to all our mutual benefits.

Mr. SHIRLEY. Good afternoon, your honor.

The CHAIRMAN. Thank you very much.

Senator MURKOWSKI. Thank you.

Well, I appreciate the testimony of those who were able to participate on the panel this morning and now into the afternoon. And for those of you who have attended and for those that have come long distances, we appreciate all you have given us this morning.

Because of the complexity of some of the issues and the delay in receiving some of the testimony that we did get today, the record on this legislation will remain, or for this subcommittee, will remain open until the close of business on Thursday for submission of additional questions, and then an additional 2 weeks for other materials that you would like to have submitted to the subcommittee for consideration.

So with that, I thank the members, Senator Kyl, Senator Domenici, and for all those that came today. With that, we are adjourned.

[Whereupon, at 12:27 p.m., the hearing was adjourned.]

APPENDIXES

APPENDIX I

Responses to Additional Questions

ARIZONA DEPARTMENT OF WATER RESOURCES,
Phoenix, AZ, October 14, 2003.

Hon. LISA A. MURKOWSKI,
Chairman, Subcommittee on Water and Power, Senate Committee on Energy and Natural Resources, Washington, DC.

DEAR MADAME CHAIRMAN MURKOWSKI: Thank you for the opportunity to appear before the Subcommittee on Water and Power to present the State of Arizona's testimony on S. 437, the Arizona Water Settlement Act.

I have reviewed the question submitted by Senator Bingaman and have enclosed my answer to his written question. Additionally, I enclosed an answer to the question that Senator Bingaman posed during my testimony. Finally, the Central Arizona Water Conservation District (who submitted separate testimony) and the Arizona Department Water Resources prepared supplemental information in response to the written and oral testimony of the San Carlos Apache Tribe about S. 437. The Cities of Phoenix, Chandler, Glendale, Goodyear, Mesa, Peoria, Tucson, and Scottsdale; the Maricopa Stanfield Irrigation and Drainage District, and the Central Arizona Irrigation and Drainage District have reviewed this supplemental response and those entities support the submittal of the supplemental response.

I respectfully ask that my responses to questions and the supplemental response be made a part of the official hearing record. Again, I thank you for the opportunity to represent the State of Arizona before the Subcommittee.

Sincerely,

HERBERT R. GUENTHER,
Director.

[Enclosures.]

QUESTION FROM SENATOR BINGAMAN

Question. It is my understanding that the Upper Valley settlement included in S. 437 includes provisions that authorize groundwater pumping up to an amount of 6 acre-feet acre. This would seem to allow for increased depletions in Upper Gila, but your statement sets out that the Upper Gila settlement will lead to "real reductions in water use, to the benefit of the river's health." Can you briefly explain how the Upper Valley settlement is structured so that we can understand how it may lead to reduced depletions from the Upper Gila River?

Answer. At dispute has been irrigated lands near decreed acreage that may or may not have been irrigated with Gila River water over the years. The settlement sets up a procedure to transfer decreed rights to some of the acres while retiring others. In essence this reduces the overall acreage being irrigated in the Upper Gila Valley. Finally, the settlement provides that the irrigation districts in the Upper Gila Valley will permanently retire 3000 acres of currently farmed decreed lands. This retirement will reduce diversions off the River and its conjunctive groundwater pumping. The settlement also provides that if an agreement is reached over the water rights of the San Carlos Apaches the irrigation districts will transfer another 2000 acres of decreed rights to the Apaches, and another 500 acres would be retired for the benefit of the Gila River Indian Community.

Under the 1935 Globe Equity Decree the farmers in the Upper Gila Valley were granted a diversion right of 6 acre-feet per acre of decreed lands. Over the years

the farmers supplemented this supply with groundwater. The Globe Equity Court has wrestled with the groundwater pumping issue for many years without clarifying the relationship between surface water and groundwater. Under the settlement the 6 acre-feet per acre limit is on conjunctive use of surface and groundwater supplies. Therefore the farmers will be limited to a total amount of water regardless of source.

QUESTION FROM SENATOR BINGAMAN AT THE HEARING

Question. The Navajo Nation has recommended that section 104 be amended to allow the Secretary to reallocate Central Arizona Project (CAP) water for drinking water purposes prior to congressionally approved water settlement with the Navajo Nation. Would you object to Congress making this change?

Answer. We believe it is unnecessary to change that provision, and would be inconsistent with the purposes of the Title I CAP settlement. In the 1980s the Secretary made allocations of CAP water to Arizona Indian tribes without any requirement of settlement of water rights claims. The purpose of the restriction in section 104(a)(1)(B)(i) is to make the limited resource of CAP water available for future tribal water settlements. This provision was negotiated over several years and is a key to the CAP settlement. Such an amendment would require the agreement of the settlement parties. Various parties in Arizona have indicated they may no longer support S. 437 should this provision be deleted or amended to bypass the tribal water settlement requirement.

We do not believe the water defined in section 104 best meets the needs of the Navajo Nation in terms of immediacy. Such water will not be available for reallocation until the final enforceability date after congressional passage. It is estimated that the necessary court approvals, state legislative actions, and funding requirements will place that date several years away, time enough to reach a tribal water settlement with the Navajo Nation.

We are currently in negotiations with the Navajo Nation about their mainstem water claims. Through these negotiations and other talks we are exploring options with the Navajo Nation of other Arizona Lower Basin allocations and from Arizona's Upper Basin allocation to meet the Window Rock needs.

ARIZONA SUPPLEMENTAL TESTIMONY IN RESPONSE TO SAN CARLOS APACHE TRIBE WRITTEN TESTIMONY

The written testimony submitted by the San Carlos Apache Tribe regarding S. 437 and H.R. 885 contained errors and misstatements, the most notable of which are set forth below (in italics) followed by a correct statement of the facts.

"The San Carlos Apache Tribe was intentionally and systematically excluded from the drafting of this Settlement, and from participating in the negotiations of the settlement agreements which have occurred over the last several years." (Statement of Kathleen W. Kitcheyan, page 3)

Fact: The San Carlos Apache Tribe was not excluded from the negotiation or drafting of the Arizona Water Settlements Act or the Gila River Indian Community Water Rights Settlement Agreement. To the contrary, the Tribe was repeatedly invited to participate, but chose not to.

"Section 106(b) of the proposed legislation' would relieve CAWCD of $73,561,337 in capital debt to the United States for the CAP." (p. 6)

Fact: The legislation does not relieve CAWCD of any CAP repayment debt. The debt relieved in section 106(b) is debt owed by non-Indian irrigation districts for construction of their CAP distribution systems. That debt is being relieved to compensate the non-Indian irrigators for relinquishing their long-term CAP water rights to make that CAP water available to settle the water rights claims of Indian tribes such as the San Carlos Apache Tribe. As part of the relinquishment, CAWCD will pay $85 million of the irrigators' debt in addition to its CAP repayment debt.

"The proposed legislation permits CAWCD to continue discriminatory pricing of Indian CAP water, and to keep all of the power and other revenues to subsidize non-Indian use of CAP water to the lowest rates, thus making Indian use of CAP water virtually impossible." (p. 8)

Fact: The legislation does not address the pricing of CAP water. By law and contract, CAWCD operates the CAP and sets rates for water delivery to non-Indian water users and for federal uses. The Secretary of the Interior (Secretary) then decides what delivery rate Indian tribes will pay; if the rate charged Indian tribes is less than the federal use rate established by CAWCD, then the Secretary is responsible for paying the difference. The CAP delivery rate established by CAWCD for federal uses is the same as that for non-Indian CAP subcontractors and is tied to

the actual cost of delivering water. As part of the Arizona Water Settlement Agreement, to which the United States is a party, CAWCD has promised to deliver to non-Indian farmers a limited quantity of CAP water for a limited time at less than the full cost of delivering that water. The non-Indian irrigators will receive low-cost pricing in return for permanently relinquishing their long-term rights to CAP water so that water can be reallocated to Indian tribes such as the San Carlos Apaches to facilitate Indian water rights settlements. The water to be delivered to those farmers is "excess" CAP water—that is, water that is not ordered by those with long-term CAP contract entitlements. CAWCD's taxpayers will pay the remainder of the cost of delivering excess water to the non-Indian farmers. Indian tribes such as the San Carlos Apaches do not pay taxes to CAWCD. Power revenues are not used to subsidize CAP rates for non-Indian water users. Far from making Indian use of CAP water "impossible," the Act will instead allow the use of Development Fund revenues to pay a substantial portion of the cost of delivering CAP water to Indian tribes, leaving the tribes to pay the same effective rate as non-Indian irrigators and far less than CAP municipal and industrial water users.

"The proposed allocation of CAP water in the Arizona Water Settlements Act increases the size of the Indian and M&I water categories, which in turn, increases the uncertainty of the entire pool of Indian and non-Indian CAP water pools." (p. 10)

Fact: The Act does not increase the amount of Indian and M&I priority water; all CAP water reallocated under the Act will retain its existing priority. [See, e.g., section 104(a)(3)] The act will not "increase uncertainty," but rather will improve the reliability of the San Carlos Apache Tribe's CAP water in at least two respects. First, the Act enhances the reliability of the Tribe's M&I priority water by reducing the ability to convert lower priority non-Indian agricultural water to M&I priority, thereby diluting the M&I pool. Second, the new shortage sharing criteria in the Gila River Indian Community water rights settlement agreement will elevate the priority of the Tribe's "Indian irrigation" water to be the same as its "Tribal homeland" water.

"The proposed legislation prescribes an entirely new system for use of the [Development] Fund which greatly assists CAWCD in its repayment obligation for the non-Indian portion of construction costs of the CAP (which will be reduced to $1.65 billion in the proposed legislation), assists in payment of OM&R expenses for non-Indians, and relegates, except for the benefits of GRIC, the Indian portion of construction costs, the funds for construction of Indian CAP projects, and payment of Indian OM&R to the leftover scraps, if any." (p. 11)

Fact: Under existing law and contract, Development Fund revenues are applied each year against CAWCD's repayment obligation. The Act does not alter that arrangement in any respect and provides no additional "assistance" to CAWCD. Nor does the Act reduce CAWCD's repayment obligation for the CAP, which was established in a stipulated settlement of litigation in U.S. District Court between CAWCD and the United States. The Development Fund does not pay any OM&R expenses for CAP water delivered under contract with non-Indian CAP water users, either currently or under the Act. Indeed, the first priority use of Development Fund revenues under the Act is to pay the fixed OM&R costs of delivering CAP water to Indian tribes, such as the San Carlos Apache Tribe. No Indian tribe has ever been asked to repay one cent of the cost of constructing the CAP. By comparison, non-Indian water users, through CAWCD, have repaid the federal government nearly $700 million thus far. The Act does not alter the provisions of the Basin Project Act that authorize appropriations for the construction of CAP distribution systems for Indian tribes. The State of Arizona and CAWCD have supported appropriations necessary for the construction of those systems and will continue to do so. Far from relegating tribes to the "leftover scraps," the Act supplements traditional methods of finding the construction of Indian distribution systems by authorizing use of Development Fund revenues, in addition to appropriations, for that purpose.

"The proposed legislation would tie the development of infrastructure to deliver a Tribe's CAP water entitlement, obtained in the 1980 contract, to a final settlement of the Tribe's water rights." (p. 15)

Fact: The Act would allow the use of Development Fund revenues to fund construction of CAP distribution systems for tribes that have Congressionally approved water rights settlements, such as the San Carlos Apache Tribe, as well as other specific tribes without settlements, such as the Yavapai-Apache. The Act does not preclude Congress from making appropriations to fund construction of CAP distribution systems for tribes that do not have final Indian water rights settlements.

"The new shortage sharing criteria creates a structure whereby Indians will be required to take a greater reduction in their CAP supplies than required by the current Indian CAP contracts and non-Indians will bear less of the burden for the shortage than under the current non-Indian M&I contracts." (p. 16)

Fact: The shortage sharing criteria in the Gila River Indian Community water rights settlement agreement reconciles incompatible provisions in the CAP Indian contracts, CAP non-Indian subcontracts and the Secretary of the Interior's 1983 Record of Decision regarding the allocation of CAP water. It does so in a manner that is fair and equitable to all CAP water users. The new shortage sharing criteria will not apply to any CAP Indian tribe, including the San Carlos Apache Tribe, unless that tribe agrees to be bound by them.

"Under Title II of the proposed legislation, when the CAP canal capacity is not enough to deliver all CAP Water Orders, GRIC will be the last required to take a reduction." (p. 17)

Fact: There is no such provision in Title 2 (or elsewhere in the Act). If canal capacity is limited, the Gila River Indian Community is entitled to receive no greater percentage of its annual water order in any month than any other similarly situated CAP water user.

"The proposed legislation would eliminate the Secretary of Interior's discretion of determining when a shortage exists and the discretion of determining many of the terms of CAP delivery contracts." (p. 17)

Fact: The Act will not affect the Secretary's discretion in determining whether a shortage exists on the Colorado River or in implementing CAP delivery contracts.

SUPPLEMENTAL TESTIMONY SUBMITTED BY THE GILA RIVER INDIAN COMMUNITY

This supplemental testimony is being submitted to correct certain errors, omissions, and misstatements contained in the testimony of the San Carlos Apache Tribe (SCAT). Because of the large number of such errors, omissions and misstatements the Gila River Indian Community (Community) has limited its supplemental testimony to those that were most egregious or potentially misleading. The italicized text below indicates the error, omission or misstatement being addressed and the Fact section presents the Community's correction for the record.

I. San Carlos Apache Reservation

A. Water Sources

During the hearing before the House Water and Power Subcommittee of the House Resources Committee, the Chairperson of the San Carlos Apache Tribe asserted that the flow of the Gila River was contaminated by pollution that causes birth defects on the SCAT Reservation.

Fact: First, as, discussed in greater detail below, the only known water quality issue present in the upper Gila River concerns salinity from within the Gila River basin. It is generally accepted that elevated salinity levels in water, particularly of the levels found in the upper Gila River basin, do not, by themselves, cause birth defects. The Community recently contacted local and state health officials to confirm that there is no known connection between salinity in water and birth defects.

Second, even if there were a connection between increased salinity and birth defects, which there is not, SCAT's written testimony to the Committee confirms that SCAT does not use Gila River water for any domestic or municipal use but rather relies exclusively on groundwater for domestic and municipal uses.

Third, although the rate for all Arizona Indians is high by comparison to non-Indians, the rate of birth defects at SCAT (2.4%) is not elevated at all by comparison to the average rate of all other tribes in Arizona (2.5%).

During the hearing, an attorney for SCAT indicated that federal court rulings explicitly require the delivery of SCAT's 6,000 acre-feet of water per year of water (afy) by direct diversion from the Gila River, rather than by means of an upstream diversion into a pipeline that avoids high salinity springs that flow into the Gila River.

Fact: SCAT's written testimony includes the Water Quality Injunction issued by the Globe Equity Court on May 28, 1996, which states:

"Nothing in this injunction shall prohibit the parties, upon agreement or by order of this Court, from connecting the Apache Tribe's irrigation system directly to the canals of the Gila Valley Irrigation District for delivery of water directly to Apache farm lands. *The connections may be made by canal or a pipe."* (SCAT Exhibit K, p. 14 (emphasis supplied).

II. Overview of Title I and Title II of the Arizona Water Settlement (sic.) Act (S. 437 and H.R. 885)

The settlement agreements and the exhibits to the settlement agreement "attempt to 'legislate' the water rights of [certain] parties in lieu of their adjudication in the Gila River Adjudication." (p. 3.).

Fact: First, a condition of the enforceability of the Arizona Water Settlements Act is the approval by the Gila River Adjudication Court of the Gila River Indian Community Water Rights Settlement Agreement (Settlement Agreement). Thus, any water rights confirmed to the Community as a result of this settlement will be reviewed, and hopefully approved, by the Gila River Adjudication Court. During this court approval process any affected party, including SCAT or the United States on its behalf, may object to the settlement stating the grounds for their objection. The Gila River Adjudication Court will then render a judicial determination itself approving the Settlement Agreement or not.

Second, all of the Indian tribes with claims to the waters of the Gila River and its tributaries are participating in the Gila River Adjudication. Several of these Indian tribes, including, SCAT, have reached agreements with other parties asserting adverse or competing claims. These agreements provide that in exchange for an agreement on the amount of reserved right to be asserted by or on behalf of the Indian tribe, the tribe and the United States in its trust capacity for that tribe, agree not to challenge the claims of the parties to the agreement. In addition to entering such an agreement, SCAT sought and obtained a Special Proceeding before the Gila River Adjudication Court to obtain expeditious consideration of its agreement. The Court's order was issued December 12, 1999. There is absolutely no basis for SCAT to challenge the Community's effort to utilize the same process to reach settlements in the Adjudication. The Community's settlement no more "legislates" water rights in the Adjudication than the SCAT Settlement, the Fort McDowell Settlement, the Salt River Pima-Maricopa Settlement, or the Yavapia-Prescott Settlement.

"The proposed legislation also attempts to settle all pending disputes between certain decreed parties in the Globe Equity No. 59 proceeding." (p. 3)

Fact: First, the legislation and the Settlement Agreement only address the Community's pending disputes with certain parties in the Globe Equity 59 enforcement proceeding. All other parties, including SCAT, retain all their legal rights in connection with any pending or future proceedings to protect their rights or claims to water in Arizona.

Second, an additional condition to the enforceability of the Arizona Water Settlements Act is the approval of the Community's Settlement Agreement by the Globe Equity Court. Thus, any water claims settled by the Community as a result of this settlement will be reviewed, and hopefully approved, by the Globe Equity Court. During this court approval process any affected party, including SCAT or the United States on its behalf, may object to the settlement stating the grounds for their objection. The Globe Equity Court will then render a judicial determination itself approving the agreement or not.

"The settlement agreements would allow Gila Valley and Franklin Irrigation Districts to continue to pump up to six acre-feet per year of water from the "subflow" of the Gila River in violation of the Tribes senior 1846 water rights under the Globe Equity Decree and continue to divert water for "hot lands" which do not have any decreed water rights." (p. 3)

Fact: The Community has agreed not to challenge uses of up to 6 afy of water (by pumping and direct river diversions) on a number of acres that is reduced from current levels by 3,000 acres. The Community's agreement not to challenge such uses is contingent on the Upper Valley Diverters' ("UVDs") compliance with very specific conditions set forth in the UVD Agreement, including monitoring requirements and control of phreatophytes, among many others. The existing "hot lands" are part of the acreage limit to the extent they become Decreed lands pursuant to application to Globe Equity court for such status. SCAT may object to such application, as may the United States on SCAT's behalf, or any other party except the Community.

Overall, the UVD agreement will unquestionably reduce UVD water use and consumption. Diversion and pumping records for the period 1936-1997 clearly show that pumping and surface diversions as well as total consumptive use of water by crops will be reduced when the Settlement Agreement is fully implemented. The Settlement Agreement holds the UVDs to total pumping and diversions of approximately 181,860 afy. In every year since 1956, the UVDs combined pumping and diversions have substantially exceeded this amount. The average of the UVDs combined pumping and direct diversions for the period 1937 to 1997 was almost 230,000 afy.

Most significantly, all uses of water, even uses that conform to the UVD agreement, will still remain subject to challenges by SCAT if they believe such uses affect their 1846 water right. There is nothing in the legislation, the Settlement Agreement or its exhibits which prevents SCAT or the United States, in any capacity

other than as trustee for the Community, from proceeding with any new or existing claims against the UVDs.

III. Central Arizona Project

B. Repayment of CAP Debt to United States

"If CAWCD's debt was $1.65 billion, that would leave approximately $2.35 billion in project costs unresolved and possibly charged to Indian lands." (p. 6-7.)

Fact: There is simply no basis in federal law or policy for even speculating about whether CAP costs will be disproportionately charged to Indian tribes because the Colorado River Basin Project Development Act of 1968 (CRBPA) imposes the following limitation:

> "The Secretary shall determine the repayment capability of Indian lands within, under, or served by any unit of the Central Arizona Project. Construction costs allocated to irrigation of Indian lands and within the repayment capability of such lands [shall be indefinitely deferred as provided in 25 U.S.C. § 386a], and such costs that are beyond repayment capability of such lands *shall be non-reimbursable."* (43 U.S. §§ 1542, emphasis supplied)

Other parties address the SCAT's other misstatements about CAP repayment.

C. CAWCD Sells Indian Water to Non-Indians and Keeps the Income.

D. CAWCD Discriminates Against Indians in Its Pricing Structure for CAP Water Which Makes Tribal Use of CAP Water Under Indian Contracts Cost Prohibitive.

E. Disincentive to Construct Tribal CAP Projects Due to CAWCDs ability to Market Indian Water for Non-Indians and Keep the Income

Fact: The Community agrees that CAWCD has very recently proposed a problematic "excess water" pricing scheme, which, if implemented, would allow non-Indians to purchase CAP water at a lower rate than Indian tribes. Such policy would affect the Community more than SCAT because the Community has an existing CAP allocation of water that is larger than that of SCAT. The enactment of Title I of S. 437 and H.R. 885 will provide immediate relief from the disparity caused by this proposed CAWCD pricing scheme. In addition, because CAWCD will be reimbursed by the federal government for fixed Operation, Maintenance, and Replacement (OM&R) charges for CAP water held under long-term tribal contracts, and not for reimbursed for such charges for "excess water", the CAWCD's incentive will be to encourage the use of CAP water by Indians.

H. CRBP Development Fund Will be Used for Non-Project Purposes and Will Continue to Be Used to the Disadvantage of Indians

Fact: Each of the points raised in this section are effectively refuted by the proposed amendment to § 403 (43 U.S.C. § 1543) of the Colorado River Basin Project Act (CRBPA).

Three sources of revenue established by the CRBPA and the "annual payment by the CAWCD to effect repayment of reimbursable CAWCD construction costs [$1.65 billion], shall be credited against the annual payment owed by the CAWCD," and then all of these funds:

> "shall be available annually, without further appropriation, in order of priority: (A) to pay fixed operation, maintenance, and replacement charges associated with the delivery of Central Arizona Project water under long-term contracts for use by Arizona Indian tribes." (§ 107(a))

"GRIC is first in line to take the credits from the annual payments made by CAWCD each year. GRIC proposes to not only use the Fund for CAP purposes . . . it will use $147 million to rehabilitate its BIA San Carlos Irrigation Project system which delivers water to GRIC from the Gila River." (p. 12)

Fact: The Settlement Agreement ratified by S. 437 and H.R. 885 impose an annual cap of $25 million on the amount of money available from the Lower Colorado River Basin Development Fund (Development Fund) for San Carlos Irrigation Project (SCIP) rehabilitation. This ensures that every year there will be millions of dollars in excess of this particular cap that can and will be applied to other Indian projects. At the request of other parties, the Community agreed to this annual limit to ensure that other Indian water projects are also paid for on an ongoing basis. The Bureau of Reclamation has developed a projection of funding inflows and outflows for the Development Fund that demonstrates that all Indian projects currently contemplated, including SCAT, will be funded in a timely and certain manner.

SCAT appears to argue that none of the Development Fund should be available for tribal irrigation systems unless those systems are used exclusively for CAP water. Yet the SCAT project authorized by its 1992 settlement, and funded by the

Development Fund, will deliver both CAP water and non-CAP water. "The draft EIS will evaluate reasonable alternative methods of delivering the CAP water and other waters" including 6,000 afy of G.E. 59 decreed water, 7,300 afy from the Black and/or Salt Rivers, and water from local Tribal water sources. (Notice of Intent to Prepare EIS, 67 Federal Register 8316 (February, 2002)

In addition, SCAT's argument would deny access to the Development Fund to the Navajo Nation, Hopi and possibly other Indian tribes in the Gila River watershed and other Arizona watersheds if they obtain settlements that include non-CAP water supplies.

I. The Proposed Legislation Will Require That Tribes Have a Water Rights Settlement in Place Before a Tribe Can Use CAP Water Whereas Non-Indians Have Been Able to Use CAP Water for Years Without a Settlement of Water Rights

"Tribes without water settlements will not have their CAP delivery systems built until a settlement is in place. That violates the Tribe's CAP contracts." (p. 13)

Fact: This statement simply ignores the provisions of S. 437 and H.R. 885, which provide that both CAP repayment funds and appropriated funds are available "to pay the costs associated with the construction of distribution systems required to implement the provisions of . . . (II) section 3707(a)(1) of the *San Carlos Apache Tribe Water Settlement Act of 1992* (106 Stat. §747)" (emphasis added), which includes CAP delivery components. See Section 107(a) (amending section 403(f)(2)(D)(i)(II) of the CRBPA). Both bills also explicitly make funds available for the construction of on-reservation distribution systems for the Yavapai Apache (Camp Verde), Pascua Yaqui, and Tonto Apache Indian tribes along with the Sif Oidak District of the Tohono O'odham Nation." (See Section 107(a) (amending section 403(f)(2)(E) of the CRBPA)

In addition, SCAT's testimony acknowledges that money from annual appropriations, as well as funds from the Development Fund, will be available to underwrite the cost of these and other Indian distribution systems in Arizona. (p. 14).

"For over 10 years, the San Carlos Apache Tribe has had a settlement in place." (p. 14)

Fact: Unlike other statements in SCAT's testimony, this statement is correct. As discussed above, SCAT's settlement was only made enforceable in December 1999. Nevertheless, for more than 10 years, SCAT has enjoyed the certainty and other benefits it has acquired from its 1992 water settlement, a certainty that it seeks to deny to the Community. At that time, SCAT ensured that it acquired a water supply that is more reliable than other Indian tribes in Arizona can even hope for. SCAT was able to accomplish this by keeping other interested parties in the dark about its intentions and its negotiations until its settlement was included as one of the last titles in largest reclamation project legislation approved by Congress in decades. While SCAT is now championing the virtues of inclusiveness in water settlement negotiation, it did not even attempt to consult with the Community in 1992 or consider the impact of its settlement on the Community's efforts to assert claims to the Salt and Verde Rivers.

J. Gild River Indian Community's Settlement CAP Water Will Be Substantially Used by Non-Indians

Fact: SCAT fails to acknowledge that water leases are often an integral component of Indian water rights settlements, including SCAT's 1992 settlement, where they serve a variety of purposes. For example, in the Community's case, it is able to leverage CAP leases in exchange for a greater supply of treated effluent from neighboring cities. Upon close examination the leases and exchanges contemplated by the Settlement Agreement all serve such dual purposes by increasing water use efficiency and/or the reliability of the water provided to the Community. SCAT itself has leased much of the CAP water it obtained from its 1992 settlement to non-Indian parties.

L. When The CAP Canal Capacity is Not Enough to Deliver All CAP Water Orders, GRIC Will Be the Last to Be Required to Take a Reduction

Fact: This is simply incorrect. Paragraph 8.14 of the Settlement Agreement, to which the statement by SCAT is directed, simply ensures that GRIC's CAP water deliveries are not reduced based on delivery capacity unless those of "similarly located," CAP water users are also reduced.

N. San Carlos Apache Tribe's Water Rights Settlement Act Will Likely Be Impaired

Fact: At the September 30, 2003 joint hearing before the Senate Energy and Natural Resources and Senate Indian Affairs Committees and then before the Water

and Power Subcommittee of the House Committee on Resources the Acting Assistant Secretary for Indian Affairs, Aurene Martin, was asked several times whether the Arizona Water Settlements Act violated the federal government's trust responsibility to any Indian tribe. She answered that it did not. The Acting Assistant Secretary provided similar assurances to the House Water and Power Subcommittee of the House Resources Committee.

O. San Carlos Apache Tribes Water Supply from Gila River Will Be Further Diminished by Exchanges of CAP Water for Gila River Water Upstream of Tribes Reservation

Fact: The Community has already shown that the UVD agreement will decrease the amount of water used for irrigation in the upper Gila valley. The Community also notes that all exchanges contemplated by the Settlement agreement are subject to full federal environmental review before they are approved by the Secretary. They must also be approved by the Globe Equity Court. The Phelps Dodge agreement explicitly prevents the Secretary from approving the lease exchange until: "All Environmental Compliance has been completed relating to the United States' execution of the Lease and Exchange Agreement and any litigation relating to such Environmental Compliance is final and subject to no further appeal." In addition, the entire Settlement must be approved in a Special Proceeding before the Gila River Adjudication Court. SCAT will have at least three opportunities to present evidence about any impact associated with these exchanges. Finally, in an effort to ensure that the SCAT current water supply is not simply preserved, but improved both as to quality and quantity, the Community is working actively with other parties to develop a mechanism to provide SCAT with a direct delivery of Gila River water through a pipeline that avoids the salinity of which SCAT complains.

P. San Carlos-Apache Tribes Right To Power Generation Benefits of its Power Site at Coolidge Dam Will Be Diminished

Fact: Any discussion about SCAT's claim of injury based on a loss of electrical power is, of course, academic and speculative at this juncture because no electricity is being produced.

With respect to SCAT's claim that it was inadequately compensated for the construction of Coolidge Dam, this has no relevance to the settlement of water rights disputes concerning the Gila River Indian Community and Tohono O'odham Indian tribes. Whatever the merits of SCAT claims, they only serve to create confusion about unrelated issues. SCAT chose not to press for resolution of this issue when its 1992 settlement was before Congress, perhaps because it did not wish for these issues to interfere with its efforts to enact a water settlement It should not be entitled to interject these issues at this juncture, at the expense of other Arizona Indian tribes.

IV. The GRIC Settlement (S. 437 and H.R. 885) Will Result in Unprecedented Environmental Degradation to the Gila River System and Source and to San Carlos Lake

A. The Gila River System and Source As Well As San Carlos Lake Provide Some of the Last Remaining Riparian Habitat in Arizona, Which Must Be Preserved to Ensure the Continued Existence of Many Sacred, Rare, and Federally Listed Animals and Plants

1. The Habitat of the Gila River and Its Tributaries

Fact: Nothing in the Gila River Indian Water Rights Settlement Act or Settlement Agreement contradicts the provisions of P.L. 101-628 establishing the Gila Box Riparian National Conservation Area.

2. The Habitat of San Carlos Lake

Fact: SCAT's assertions about San Carlos Lake mirror a series of claims that were rejected by the U.S. District Court for Arizona in July 2003. The court found that SCAT had not presented enough evidence of any threats to threatened, endangered, or other species in San Carlos Lake to merit any further consideration of its claims. The court explicitly rejected SCAT's efforts to tie low lake levels to avian botulism. "[T]wo experts with 30 years experience treating injured and diseased raptors, one expert working in Arizona since 1973, have never encountered botulism in Bald Eagles and both stated that Bald Eagles would not likely be impacted by this disease." *SCAT v. United States,* 2003 WL 21697724 (2003 D.Axiz.)

B. The Act and Agreement Will Destroy the Flows In the Gila River Watershed and Contaminate its Flows Through the Discharge of Treated Effluent

Fact: Re-use of highly treated effluent by putting it back into river systems is a recognized mechanism for efficient water use, particularly in water-short areas such

as Arizona. Any discharges of such effluent will be governed by both federal and state law, and cannot be therefore be characterized as a contaminating pollutant.

Exchanges with Phelps Dodge, ASARCO and New Mexico can only occur after environmental compliance and then only in accordance with Article XI of the Globe Equity Decree.

"The Apache Tribe objects to the SCIDD proposal which cannot fulfill the United States' trust responsibility to the Apache Tribe to preserve and protect San Carlos Lake." (p. 31)

Fact: In July 2003, the U.S. District Court for Arizona addressed each of SCAT's claims that the operation of San Carlos Reservoir and the failure to provide a minimum storage pool breached the federal government's trust obligation to SCAT. The court rejected each of SCAT's allegation, including the allegation that the operation of the dam violates federal laws for the protection of archeological and cultural resources. The court found that SCAT had simply not presented evidence that there was any factual or legal basis to require the government to maintain the minimum project pool. In clear terms, there is no trust responsibility to maintain a minimum lake level.

V. The GRIC Settlement Expressly Exempts Itself From Compliance with the National Environmental Policy Act and Contains Broad and Sweeping Environmental Waivers

A. Exemption from NEPA Compliance

Fact: SCAT is well-aware that this provision is included in all Indian water rights settlements. For example, it was included in the San Carlos Apache Water Rights Settlement Act of 1992 (§ 3709(a), P.L. 102-575).

B. The GRIC Settlement Requires the United States to Execute Broad Waivers and Releases for Past, Present, and Future Environmental Harms

Fact: SCAT's comments purposefully ignore the limitations on the scope of the claims the United States will not assert pursuant to § 207(c). The only claims the government agrees that it will not pursue are those claims enumerated in § 207(a). These are claims that only involve the interests of the Community, its members, and its members as allottees.

VII. The GRIC Settlement Act Creates a "Template" for the Loss of Tribes' Federal Reserve Water Rights for Lands Transferred Into Trust

Fact: Indian land and water settlements frequently contain provisions that address or place constraints on future tribal acquisitions of land or water. SCAT has no objection to similar provisions in the Zuni Water Settlement (P.L. 108-34) or in Title III of the Arizona Water Settlements Act.

IX. Globe Equity Decree-Rights of the San Carlos Apache Tribe

A. Federal Globe Equity No. 59 Consent Decree

2. The San Carlos Apache Tribe Has Federal Reserved and Aboriginal Water Right Claims Pending in the Gila River General Stream Adjudication for Additional Water Rights to the Mainstem of the Gila River Which Could Affect the Globe Equity No. 59 Decree

Fact: As the testimony before the Committee explained, nothing in the Arizona Water Settlements Act impedes SCAT's effort to assert its reserved water rights claims, just as the Community accepts that SCAT could and did reach settlements with parties asserting claims adverse to the Community's reserved rights claims through the 1992 SCAT settlement legislation. The Community's settlement also preserves SCAT's ability to object to any provision its settlement in federal and state court before the Community's settlement would become effective. It also preserves SCAT's ability to object in court as to any of the possible exchanges contemplated by the Community's settlement.

3. The Globe Equity No. 59 Court Has Entered a Water Quality Injunction Against the Gila Valley and Franklin Irrigation District to Ensure That the San Carlos Apache Tribe Receives That Quality of Water Necessary to Cultivate Moderately Salt-Sensitive Crops

Fact: Nothing in the Community's settlement framework interferes with the water quality injunction, which, as discussed above, concerns only salinity from within the Gila River valley.

4. Standard for Construing the Globe Equity Decree

5. Previous Rulings by the Globe Equity Court and the Ninth Circuit Confirm that UVD Pumping is "Covered" by the Decree

The Community has no specific comments on these sections of SCAT's testimony, which recite SCAT's interpretation of certain laws and court rulings. SCAT's gener-

alized views on these topics are simply not relevant to the Committee's consideration of the Arizona Water Rights Settlements Act. As noted above, because SCAT retains all its existing rights and claims, it can vigorously pursue the enforcement of such rights and claims using such interpretations as a basis for its actions.

B. The Arizona Gila River General Stream Adjudication

1. The San Carlos Apache Tribe Has Unadjudicated Federal Reserved and Aboriginal Water Right Claims to Waters of the Mainstem and Tributaries of the Gila River in the Arizona Gila River General Stream Adjudication.

Fact: Under the Arizona Water Settlements Act, the Community will not seek to increase the reserved rights available to it in the Gila River. Nothing in the proposed legislation interferes with SCAT's right or ability to attempt to increase its reserved rights through litigation or separate settlement.

GILA RIVER INDIAN COMMUNITY,
Sacaton, AZ, October 31, 2003.

Hon. LISA A. MURKOWSKI,
Chairperson, Water and Power Subcommittee of the Senate Committee on Energy and Natural Resources, Washington, DC.

DEAR SENATOR MURKOWSKI: Thank you for the opportunity to answer the follow-up questions you submitted after the Water and Power Subcommittee's September 30, 2003 hearing on S. 437, Arizona Water Settlements Act. The answers to the questions you submitted are attached.

Your interest and participating in the consideration of this important legislation is greatly appreciated by the members of the Gila River Indian Community (Community).

Please contact me if the Community can be of any assistance in the Committee's deliberations on S. 437.

Best Regards,

RICHARD NARCIA,
Governor.

[Enclosure.]

ANSWERS TO QUESTIONS SUBMITTED TO THE GILA RIVER INDIAN COMMUNITY BY THE SUBCOMMITTEE ON WATER AND POWER, SENATE COMMITTEE ON ENERGY AND NATURAL RESOURCES

Question. As you know, Secretary Norton has made wise water management a focus of her tenure. Do you believe this settlement is consistent with the Secretary's Water 2025 initiative?

Answer. Yes. The Interior Department's 2025 program features six stated principles; which the Gila River Indian Community settlement satisfies in the following manner:

1. Recognize and respect state, tribal, and federal water rights, contracts, and interstate compacts or decrees of the United States Supreme Court that allocate the right to use water. The Arizona Water Settlements Act, S. 437, builds upon existing decrees and federal laws. Most significantly, under S. 437 The Community and the United States as The Community's trustee agree that they will no longer assert a reserved water rights claim to the Gila River that exceeds 2 million acre feet of water year. In addition, Title I of the Settlements Act incorporates a settlement agreement approved by the United States District Court of Arizona. This agreement resolves significant conflicts over the repayment, operation, management of the Central Arizona Project (CAP) and, in the process; makes available water needed to settle long-standing Indian water rights claims. This additional water will be available to avoid further litigation, and guarantee that the United States satisfies its trust responsibility to Native American communities in Arizona.

2. Maintain and modernize existing water facilities so they continue to provide water and power. The Settlement Act will provide a dependable revenue-stream to provide for the rehabilitation and completion of the portions of the San Carlos Irrigation Project that were promised to the Community over a half a century ago.

3. Enhance water conservation, use efficiency, and resource monitoring to allow existing water supplies to be used more effectively. There are broad-ranging beneficial environmental impacts from The Settlement Act. First, the Settlement Act resolves the GRIC's ancient claims to water without having to rely on developing new sources of water but instead by using existing sources of water from Indian and non-Indian parties to the agreement, including extensive re-use of waste water as a water management tool. Second the Settlement Act provides adequate supplies of

water for non-Indian water users up-stream and thereby reduces the incentive to pump groundwater and encourages the State to store groundwater by lowering the cost of CAP water, encouraging CAP water use over groundwater use. Finally, by providing certainty to local, state and tribal leaders, as well as industry and citizens, concerning future water use in Arizona, the Settlement Act provides the missing element of a coherent, long-term water framework for the State's future to enable the State to effectively manage on a long-term basis increasingly scarce water resources.

4. Use collaborative approaches and market based transfers to minimize conflicts. The settlement is a comprehensive agreement negotiated over the last 13+ years among hundreds of individuals representing state, local, Native American, agriculture and industry stakeholders in Arizona and the United States Government. It settles ancient disputes over water rights, thereby allowing the United States, the State of Arizona, and the numerous Central Arizona Project (CAP) water users in Arizona including the tribes to avoid costly and protracted litigation of water rights and damage claims. It provides certainty to local, state and tribal leaders, as well as industry and citizens, concerning future water use in Arizona, thereby furnishing the missing element of a coherent, long-term water framework for the State's future to enable the State to effectively manage on a long-term basis increasingly scarce water resources.

5. Improve water treatment technology, such as desalination, to help increase water supply. The settlement makes available additional water for valley cities and town, through leases, exchanges and reclamation agreements—including state-of-the-art waste water desalination projects—among the tribes and the numerous non-Indian water users in central Arizona and therefore provides increased certainty to existing users regarding rights to water allocated under the act.

6. Existing water supply infrastructure can provide additional benefits for existing and emerging water needs. The water resource and infrastructure central to the settlement agreement is the 336-mile long, Central Arizona Project (CAP), a system of aqueducts, tunnels, pumping plants and pipelines that is the largest single source of renewable water supply in Arizona. Its primary purpose is to help Arizona conserve its scarce groundwater by importing water from the Colorado River, which is renewed annually by rainfall and snowmelt. The federal government, the State of Arizona and the Central Arizona Water Conservation District (CAWCD), which operates the CAP, have long disputed how CAP water should be allocated. The settlement among these parties resolves, once and for all, the allocation of CAP water, which will enable all CAP water users and State water authorities to plan for future water needs and economic development in Arizona and will provide a quantity of CAP water and infrastructure water delivery improvement that the Secretary of the Interior may use to resolve Indian water rights claims.

Question. As you are aware, the Gila River originates in New Mexico where it is an important source of water to the State. Can you explain the steps you have taken to coordinate this settlement with the rights and claims the State can assert under existing law?

Answer. As you are aware, New Mexico water users are implicated in the ongoing Globe Equity 59 enforcement proceeding in the United States District Court in Arizona. The Community has reached an agreement that incorporates Virden valley wafer users into our effort to settle the claims raised by the Community in that litigation. The Community was very pleased that the witness representing the State of New Mexico testified that the UVD settlement incorporated in H.R. 885 is a "fair and reasonable compromise."

The Community also recognizes that the federal law that authorized the CAP also required an exchange on The Gila River to benefit New Mexico. The Community is engaged with appropriate Arizona and New Mexico parties in a diligent effort to address all of the concerns and objectives raised by the state of New Mexico. The Community believes that all of the issues raised by the State of New Mexico in these discussions can and will be resolved.

The Community also testified before the Committee that it is willing to address any additional interstate issues that may arise in the congressional deliberations over this bill. Governor Richard Narcia has directed the individuals representing the Community to give these matters their full and immediate attention and resolution.

Question. S. 437 relies on utilizing the Colorado River Lower Basin Development Fund as a guaranteed off-budget funding source to pay the costs associated with the Community's water rights settlement, other Indian water rights settlements, and other costs that will assist Indian tribes with putting their water rights to beneficial use.

How important is this funding mechanism to implementation of the settlements in the bill?

Answer. The use of the Lower Colorado River Basin Development Fund (LCRBDF) is absolutely fundamental to the Gila River Indian Water Rights Settlement Agreement (Settlement Agreement) as well as the other settlements and stipulations that are included in or contemplated by S. 437.

1. Obtaining the benefits of the Settlement Agreement immediately. In general, Indian water rights settlement legislation only becomes effective when the federal government has fully appropriated its share of the funds called for by the settlement. This process is both impractical and unworkable with respect to the Settlement Agreement because it is the largest Indian water rights settlement ever presented to Congress and because it affects millions of Arizona citizens. As a result, it is impractical to appropriate millions of dollars for the Settlement Agreement every year without obtaining the reciprocal benefit of the Community's waivers until the Settlement Agreement is fully funded. It is also unworkable to make millions of Arizona citizens wait for the Settlement to be fully-funded before the Settlement Agreement become enforceable.

Relying on the LCRBDF avoids both of these problems because it provides the only practical means for the Community to give-up its reserved water right and other claims in exchange for a revenue stream that vests immediately and that is guaranteed. In other words, while the Community will not immediately receive all of the money provided in the settlement agreement, as long as the other conditions of enforceability are met, much of the federal revenue stream will be guaranteed as a matter of explicit federal law. As the Community made clear in its testimony to the Committee, the entire federal financial contribution to the Settlement Agreement will be used to provide water to the Community's land, the facilities to utilize that water, or to assist with paying the costs associated with using water on the Gila River Indian Reservation.

2. Implementing and resolving the lawsuit involving the Central Arizona Project (CAP). The funding mechanism is also an important component of ensuring that the CAP portions of the legislation in Title I will operate as intended. Title I of S. 437 incorporates the framework of a stipulation approved by U.S. District Court of Arizona in *Central Arizona Water Conservation District* v. *United States,* (Civ. 95-625-TUC-WDB-FH and Civ. 95-1720-PHX-FHC). This lawsuit involves a controversy concerning the use, allocation, and cost of water delivered by the CAP. Through the stipulated settlement, as incorporated in Title I of S. 437, The United States reserves 47% of the CAP water supply, federal government entered into a stipulation to resolve certain disputes involving the CAP, including for Indian water settlements. Through such settlements, Indian tribes give up free "reserved right" water supplies for an out-of-basin supply of CAP water. The stipulation recognizes that without a "firm" funding stream to address the Operation, Maintenance, and Replacement cost associated with CAP water delivered to Indian tribes, it will be difficult to obtain additional settlements with Indian tribes and it is unlikely that Indian tribes will be able to actually utilize the portion of CAP water reserved for their use by the stipulation.

3. Settling other Indian water rights claims. Finally, the funding mechanism of this bill is the strongest possible affirmation that the federal government is serious about reaching a fair and binding settlement with every Arizona Indian tribe that is willing to negotiate in good faith. For the first time, the United States will be able to negotiate with Indian tribes in Arizona knowing that if they are able to reach a settlement, they will have the revenue, a certain quantity of CAP water, and the resources to guarantee that the operation, maintenance, and replacement costs associated with that water can be paid for both for this generation and the next generation. In other words, the use of the LCRBDF is necessary for both the settlements included in S. 437 as well as subsequent settlements that are contemplated by this legislation.

APPENDIX II

Additional Material Submitted for the Record

SAN CARLOS APACHE TRIBE,
San Carlos, AZ, September 18, 2003.

Hon. PETE V. DOMENICI,
Chairman, Hart Senate Office Building, Washington, DC.

Re: Arizona Water Settlement Act S. 437 and H.R. 885—San Carlos Apache Tribe

DEAR SENATOR DOMENICI: The San Carlos Apache Tribe respectfully requests an opportunity to testify and answer questions during the hearing currently proposed for September 30, 2003, at 10:00 a.m., and all related future proceedings on the above referenced matters.

S. 437 adversely impacts the priority and reliability of our CAP water supply and potential funding of the Central Arizona Project Contract between the Tribe and the United States dated December 11, 1980.

It also unfairly allocates scarce federal water and financial resources to the proposed settlement which leaves the United States with inadequate "wet" water resources to meet the trust responsibility to provide an adequate water supply for the permanent Tribal Homeland for our Tribe and other Tribes in Arizona, and is contrary to the Apache Treaty of 1852, 10 Stat. 979.

It interferes with our decreed rights under the Globe Equity No. 59, and active litigation in Federal and State Court on the Gila River in Arizona and New Mexico.

We are grateful for your courtesy and respectfully ask that you authorize your staff to arrange the details for our testimony with our attorney, Joe P. Sparks, Sparks, Tehan & Ryley, P.C., 7503 First Street, Scottsdale, AZ 85251, phone 480-949-1339 and fax 480-949-7587.

Yours truly,

KATHLEEN W. KITCHEYAN,
Chairwoman.

LATHAM & WATKINS, LLP,
Washington, DC, September 26, 2003.

Hon. PETE V. DOMENICI,
Chairman, Energy and Natural Resource Committee, Washington, DC.

DEAR SENATOR DOMENICI: I am writing in support of the Gila River Indian Water Rights Settlement which is included in Senate Bill 437 introduced by Senators Kyl and McCain.

The Gila River Settlement is the result of negotiations initiated by Senator Kyl some six years ago during my tenure as Secretary of the Interior. With support from the Department during both the Clinton and Bush administrations, Senator Kyl has managed to achieve a consensus supported by our Governor, the Arizona State Department of Water Resources, and cities, towns and irrigation districts throughout the State.

As you are well aware, the equitable resolution of Indian water rights is always a complex, lengthy and difficult process; and that has been especially true in this instance, given the extensive Gila River claims grounded in both historical use and the reserved rights doctrine. This settlement has been achieved through a long process of give and take and it now represents a broad consensus of how our limited water resources can he used and developed for the benefit of all Arizonans.

I urge your favorable consideration of this settlement.

Very truly yours,

BRUCE BABBITT.

RENAUD, COOK & DRURY, P.A.,
Phoenix, AZ, September 29, 2003.

Senator LISA MURKOWSKI,
U.S. Senate, Water & Energy Subcommittee, Washington, DC.

Re: Smith Farms Pretzer Land and Cattle v. MSIDD & CAIDD CV 2001-00924

DEAR SENATOR MURKOWSKI: I respectfully ask that this letter and its testimonial exhibits* be considered by the Water & Energy Subcommittee hearing on the Arizona Water Settlement Act bill (S. 437) scheduled to begin on September 30, 2003 at 10:00 a.m. I represent a number of plaintiffs who are involved in litigation in the Pinal County Superior Court who are suing to prevent the relinquishment of their allocated rights to Central Arizona Project water that is appurtenant to their lands by Section 8 of the Reclamation Act of 1902, as confirmed by decisions of the United States Supreme Court and by Arizona's supreme court.[1] The lead plaintiffs are John Smith and Norman Pretzer, the president of plaintiff Pretzer Land & Cattle Company, Inc., who were the presidents of Maricopa-Stanfield Irrigation and Drainage District (MSIDD) and Central Arizona Irrigation and Drainage District (CAIDD), when those districts signed a subcontract with Central Arizona Water Conservation District (CAWCD) and the United States on November 21, 1983. These contracts were executed for the primary and only purpose of delivering CAP water to these districts. MSIDD now has 87,142 irrigable acres that are now qualified to receive reclamation water and CAIDD has 87,349 acres.

The Department of the Interior on March 24, 1983 (see 48 F.R. 12446) allocated CAP water. The allocations were 309,828 acre-feet annually for Indian use and 640,000 acre-feet annually for municipal and industrial use. Deducting expected evaporation per year of 75,000 acre-feet leaves, more or less, 475,000 acre-feet available for non-Indian agricultural use. MSIDD was allocated 20.48 percent, which is approximately 97,200 acre-feet per year, and CAIDD was allocated 18.01 percent, which is approximately 85,547 acre-feet per year. The reason for this letter is the legislation under consideration is an attempt to take away (respectfully, illegally) allocated water to MSIDD and CAIDD irrigators that desire to keep their allocations. A loss of allocated priority CAP water to lands in MSIDD and CAIDD will, in the future, cause them to become dust bowls. See the attached copies of affidavits of John Smith and Norman Pretzer, and in particular, their paragraph 6.

Messrs. Pretzer and Smith worked hard to bring CAP water to the districts because they realized that without it the reduction in groundwater levels would eventually cause farming to be impossible. Mr. Smith, for MSIDD, on July 21, 1981, sent a letter to Mr. Eugene Heinz, regional director, Lower Colorado Regional Office, U.S. Bureau of Reclamation, that enclosed an application for a loan to provide part of the funds for a canal from the CAP Canal to land in MSIDD. This letter reads "that the construction of the irrigation distribution system project" would "deliver urgently needed Colorado River water to the District from the facilities of the Central Arizona Project." This is consistent with the purpose of the Boulder Canyon Project Act that authorized construction of the Central Arizona Project that was "[f]or the purpose of furnishing irrigation water and municipal water supplies to the water-deficient areas of Arizona. . . ." Mr. Smith's such letter was followed by a report by the DOT's regional director that approved the application that recognized that CAP water is to serve as a replacement water supply, thus decreasing the rate of groundwater overdraft currently being experienced. CAIDD made a similar application.

With the help of the United States, MSIDD in 1984 issued general obligation unlimited tax bonds in the sum of $26,000,000 and CAIDD issued general obligation unlimited tax bonds in the sum of $22,700,000 in 1984 that paid approximately 20

*The exhibits have been retained in subcommittee files.

[1] Section 8 of the Reclamation Act of 1902 reads: "The right to use of water acquired under the provisions of the Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right." *Nebraska v. Wyoming,* 325 U.S. 589, 65 S.Ct. 1332 (1945), after quoting from this section 8 of the Reclamation Act, decided that the rights to reclamation water that "were acquired by the landowners in the precise manner contemplated by Congress . . . are recognized . . . water rights of the landowners" and "[t]o allocate those water rights to the United States would be to disregard the rights of the landowners." 325 U.S. at 615, 616, 65 S.Ct. 1349, 1350. *California v. United States,* 438 U.S. 645, 675, 98 S.Ct. 2935. 3001 (1978), held that not only does § 8 of the Reclamation Act of 1902 "provide for the protection of vested rights, but it also requires the Secretary [of the Interior] to comply with state law in the 'control, appropriation, use or distribution of the water.'" Arizona's supreme court in *Day v. Buckeye Water Cons. Drainage Dist.,* 28 Ariz. 466, 478, 237 P. 639, 640 (1925), decided that the use by districts' landowners of water received from an irrigation district "is appurtenant to the lands."

percent of the cost of construction of their respective canals from the CAP Canal to their districts. Messrs. Smith and Pretzer, for their districts, executed the necessary bond documents and also, on November 21, 1993 (the same date they executed the above-referenced subcontracts) executed 9(d) contracts with the Department of the Interior for repayment of monies lent by the United States for approximately 80 percent of the construction of the districts' respective canals. Since completion of the CAP canal and its features and MSIDD's and CAIDD's canal, MSIDD and CAIDD have used all of the CAP water that was allocated to their Partners in 1983 by the Department of the Interior.

The attached affidavits also explain the irreplaceable value of the right of irrigators in MSIDD and CAIDD, when they no longer desire to farm, to convert 1 acre-foot per municipal and industrial purposes that includes development for subdivisions.

The 1983 allocations provided 173,100 acres of surface CAP water for irrigation to the Gila River Indian Community (GRIC) per year. GRIC does not use all of this water. The last version of the Arizona Water Settlement Act that I have seen provides GRIC with approximately 102,000 acre-feet of priority CAP water per year and approximately 95,500 acre-feet of priority CAP water per year to other tribes that is in excess of their 1983 allocations of priority CAP water. The primary source of this water is water allocated to MSIDD and CAIDD in the 1983 allocations. The Arizona Water Settlement Act does not limit this priority CAP water taken away from MSIDD and CAIDD farmers for irrigation use or for municipal and industrial use by Indians on their reservations because it will not be used on their reservations. It will be used for leasing of water by the tribes, primarily for use in the greater Phoenix area by municipalities and water companies. Unfortunately, neither the Arizona Water Settlement Act nor any other documentation that is in existence limits the leasing price by the Indians. I have read articles that could be as high as $1,000 per acre-foot per year. For all I know, the Indians will charge even more. Thus, the contemplated legislation could cause the Indian tribes to become richer than oil owner sheiks at the expense of landowners in the Pinal County Irrigation District served by MSIDD and CAIDD.

It is doubtful that GRIC needs more surface water for irrigation or for municipal and industrial use on the reservation than it received in 1983 allocation of 173,100 acre feet per year. However, if it does need more CAP water for use on its reservation, then this need should be fairly received from all existing users of CAP water and not primarily from landowners in MSIDD and CAIDD, where farming has been in existence for decades. There should be a reasonable and fair balance of the use of CAP canal water that will prevent most of Final County being no more than a dust bawl when all of CAP canal water is being used by others.

I respectfully remind you that when the Secretary of the Interior, Gail Norton, Esq., attempted to take away CAP water from the Imperial Irrigation District, United States District Court Judge Thomas J. Whelan for the San Diego District Court on March 18, 2003 granted a preliminary injunction that restrained her and the United States from taking away CAP water that was being supplied by the Imperial Irrigation District for, the beneficial use of its irrigators.'

Plaintiffs' position is if there is to be legislation that provides more water to Indians, that legislation should be limited to water for irrigation use or for municipal and industrial purposes on the reservation and not elsewhere, and it should protect the rights of those farsighted irrigators in MSIDD and CAIDD who wish to retain their precious "gold," CAP surface water for a supplement to their farming and for municipal and industrial uses when they no longer desire to farm.

Very truly yours,

J. GORDON COOK.

CITY OF TUCSON,
Tucson, AZ, September 30, 2003.

Senator LISA MURKOWSKI,
Chair, Subcommittee on Water and Power, Committee on Energy and Natural Resources, U.S. Senate, Dirksen Senate Building, Washington, DC.

Senator BEN NIGHTHORSE CAMPBELL,
Chair, Committee on Indian Affairs, U.S. Senate, Hart Senate Building, Washington, DC.

DEAR SENATORS MURKOWSKI AND CAMPBELL: The Mayor and Council of the City of Tucson strongly endorse and urge early passage of S. 437, the Arizona Water Settlements Act. The Act would ratify and implement the largest water settlements in Arizona history, resolving long standing disputes between the State of Arizona and

the United States concerning the Central Arizona Project ("CAP") and settling two significant Indian water claims cases. Title I of the Act is important to Tucson because it resolves the division of the CAP water between Indian tribes and non-Indian water users and confirms the amount of the State's repayment obligation for construction of the CAP. Tucson was not involved in the negotiation of Title II, the Gila River Indian Community Water Settlement, but the City supports this settlement as part of the larger water settlement package contained in the Act. Of particular importance to the City of Tucson is Title III of the Act, which would amend the Southern Arizona Water Rights Settlement Act of 1982 so that the 1982 settlement between the Tohono O'odham Nation, the City of Tucson and others could, at long last, be implemented.

TITLE I

Title I of the Act deals with the repayment of the allocable costs of construction of the CAP by Arizona non-Indian beneficiaries and the division of CAP water between Arizona Indian tribes and non-Indian water users. Approximately 47% of the water will be allocated to Indian tribes and 53% will be allocated to non-Indian water users. Allocation of the water to Indian tribes is an important element of the settlement of pending Indian water rights claims. Title I contemplates that approximately 294,000 acre-feet of non-Indian agricultural ("NIA") priority water will be relinquished by CAP NIA subcontractors and be available for reallocation. Of the relinquished water, 197,500 acre-feet will be used by the U.S. for Indian water settlements, and the remaining 96,295 will be allocated to the Arizona Department of Water Resources ("ADWR") for future allocation to non-Indian municipal and industrial ("M&I") users in Arizona. Title I also assures the immediate allocation of currently un-contracted CAP M&I water to various M&I providers as recommended by the ADWR.

In addition, Title I of the Act confirms the agreement between the U.S. and the Central Arizona Water Conservation District ("CAWCD") that the obligation of CAWCD to repay the allocable costs of the CAP construction is $1.65 billion.

Until the Central Arizona Project brought Colorado River water to Southern Arizona, the City of Tucson was one of the largest cities in the world entirely dependent on groundwater. Tucson holds the largest entitlement to CAP M&I water and is using that water to significantly reduce groundwater pumping in the Tucson basin. Over the next decades, the growth and economic health of Tucson will be depend to a large degree on the availability of CAP water to the City. Enactment of Title I will assure that Tucson receives an additional allocation of 8,206 acre-feet of CAP M&I water. In addition, the City will have the opportunity to seek from the ADWR a reasonable share of the 96,295 acre-feet of CAP NIA priority water that in the future will be made available to M&I users. As the holder of the largest allocation of CAP M&I water, the City of Tucson has been paying millions of dollars in CAP capital charges toward satisfying the CAWCD's repayment obligation and has a strong interest in having the amount of that obligation clearly established. For all of these reasons, the City strongly supports the enactment of Title I of the Act.

TITLE III

In 1975, the Tohono O'odham Nation (then known as the Papago Tribe) and the United States filed suit against the City of Tucson and other water users in the Tucson basin claiming damages and seeking to enjoin groundwater pumping by the City and others in the basin. In 1982, Congress passed the Southern Arizona Water Rights Settlement Act of 1982 ("SAWRSA") to settle the water rights claims of the Nation in the Tucson basin. (The two portions of the Nation in the Tucson basin are the San Xavier District and the Eastern Schuk Toak District.) Subsequently, Indian allottees in the San Xavier district of the Nation objected to certain aspects of the settlement and opposed dismissal of the pending litigation. Consequently, implementation of SAWRSA did not occur.

The San Xavier allottees objected to the 1982 settlement because the benefits of that settlement had not been divided between the Nation and the individual Indian allottees. During the past six years, the allottees and the Nation have negotiated an agreement for such a division and have worked with the City of Tucson and others to bring the settlement up to date.

The basic elements of the 1982 settlement remain in place but are modified as follows:

- In the initial allocation of CAP water, the Nation had received 37,800 acre-feet for use in the Tucson basin. The 1982 settlement added 28,200 acre-feet of water to be obtained by the United States for use by the Nation but did not

identify the source of that water. Under S. 437, the United States will use a portion of the relinquished NIA agricultural subcontract water to supply the 28,200 acre-feet of additional water called for in the 1982 settlement.
- Provisions have been added to allow the Nation to store water underground consistent with the underground storage provisions that were added to Arizona law after 1982.
- The 1982 Act empowered the Nation to lease water for 100 years for use within the Tucson Active Management Area. The amendments in Title III allow the Nation to lease water for use anywhere in the CAWCD service area so long as Tucson area users are given a right of first refusal.
- The 1982 Act allowed the Nation to pump not more than 10,000 acre-feet per year of groundwater in the San Xavier District. The amendment in Title III provides, as a condition of the settlement, for the adoption by the Arizona Legislature of a program to protect San Xavier groundwater from new groundwater wells near the San Xavier borders. This program would be similar to the state's current well spacing and protection program for areas outside Indian reservations.

The Nation's receipt of the additional water and many of the other benefits of the settlement will only occur after the dismissal with prejudice of pending water rights litigation.

CONCLUSION

For almost thirty years, the pendency of major Indian water claim litigation has been a threat to the long-term growth and stability of the Tucson area. Because of the importance of resolving these water claims, the City of Tucson and other state and local entities have made significant contributions to the SAWRSA settlement:

- Water—In the initial allocation of CAP water, the Nation received 37,800 acre-feet for use in the Tucson basin. The 1982 settlement added 28,200 acre-feet of water to be obtained by the United States for use by the Nation. The City of Tucson contributed 28,200 acre-feet of effluent to the United States to assist the U.S. in obtaining the additional water for the Nation.
- Funds—The 1982 settlement requires the U.S. to pay the costs of providing the 37,800 acre-feet of CAP water and the 28,200 acre-feet of additional water. For this purpose, a Co-operative Fund of $10.5 million was established, to be funded 50% by the U.S. and 50% by local interests. The City of Tucson contributed $1.5 million to the Cooperative Fund; the State of Arizona contributed $2.75 million and Tucson area mines and Farmers Investment Company contributed $1 million.

Enactment of Title III, the amended Southern Arizona Water Rights Settlement Act Amendments, will ensure the dismissal of the water claims litigation of the Nation and the San Xavier allottees. The entire Arizona Water Settlements Act is a matter of the highest importance to the City of Tucson and we urge its enactment.

Sincerely,

ROBERT E. WALKUP,
Mayor.

ZUNI TRIBE,
Zuni, NM, November 12, 2003.

SENATE ENERGY AND NATURAL RESOURCES COMMITTEE, WATER AND POWER SUBCOMMITTEE,
Dirksen Senate Office Building, Washington, DC.

SENATE INDIAN AFFAIRS COMMITTEE,
Hart Senate Office Building, Washington, DC.

HOUSE COMMITTEE ON RESOURCES, SUBCOMMITTEE ON WATER AND POWER,
Longworth House Office Building, Washington, DC.

DEAR CHAIRMAN DOMENICI, CAMPBELL, AND CALVERT AND RANKING MEMBERS BINGAMAN, INOUYE, AND NAPOLITANO: I am writing to express support for the Gila River Indian Community's efforts to reach a comprehensive settlement of its water rights as provided in S. 437 and H.R. 885, the Arizona Water Settlements Act. Title II of the proposed legislation is the Gila River Indian Community Water Rights Settlement Act of 2003.

As you know, the Zuni Indian Tribe Water Rights Settlement Act of 2003, P.L. 103-34, is the most recent Indian water settlement enacted by Congress and, like S. 437, settles water rights claims in the State of Arizona. Our Zuni settlement is

unique because of the limited function of the Arizona Reservation as the site for some of our most significant religious practices. However, because the Gila River settlement contains certain provisions that are similar to those found in the Zuni water settlement legislation, I wanted to offer a few thoughts for your consideration.

Similar to S. 437, the Zuni water settlement legislation contains certain waivers of claims against the United States and other parties (including certain water quality claims), limitations on Arizona lands that can be placed into trust status absent subsequent acts of Congress, and limited waivers of sovereign immunity. During the course of the Zuni water settlement negotiations, Zuli's water rights negotiation team and the Tribal Council were faced with some very difficult, even painful choices, about how to proceed. Zuni deliberated long and hard about these and other provisions and concerns. Ultimately, however, my Tribe determined that the overall benefits of its settlement far outweighed the difficulties presented by these concessions.

The Gila River Community's settlement contains somewhat similar provisions. We are aware from our own experience of the difficult choices the Community faced in working to reach a settlement that it and the other Arizona parties could support. These decisions require a great deal of soul-searching. Under the leadership of Governor Richard Narcia and others, the Gila River Indian Community has arrived at a settlement that it believes furthers its interests and goals. In my view, Congress should defer to the Community's decisions on these difficult matters, much as it deferred to Zuni's determination that our settlement, taken as a whole, was in our best interest.

Zuni also faced concerns raised by other parties that our settlement might impede their own settlement efforts or set a harmful precedent. However, each tribal government must exercise its powers of self-determination to make choices based upon its own needs, and circumstances and decisions will differ from one tribe to another. In that regard, the decisions (and, perhaps, concessions) of the Zuni Tribe or the Gila Community should not be viewed as restricting other tribes or the federal government from making different choices or pursuing different kinds of settlements based on their own needs and circumstances. Each settlement is unique. Zuni strongly supports the efforts of its neighboring tribes in Arizona and New Mexico to settle their water rights claims where such a settlement is desired. We were also encouraged to hear that Governor Narcia has indicated he is open and receptive to meeting with the San Carlos Apache Tribe, and we support those efforts.

The Zuni Tribe wishes specifically to express its support for the Navajo Nation's suggestion that means for meeting the domestic water supply needs of Window Rock, Arizona communities should also be incorporated within the framework established by the proposed legislation. There is no more fundamental a need for water than that used for drinking, hygiene, and other domestic purposes. I have indicated to President Shirley that we support this important objective, and I deeply hope that a means for accomplishing this end will soon be produced.

Finally, the Zuni Tribe is also very encouraged to hear that there is a consensus that the consideration of the Arizona Water Settlements Act provides an opportunity to fulfill New Mexico's right to increase its use of the Gila River by 18,000 acre-feet per year, as promised by the 1968 Colorado River Basin Development Act. The Zuni Tribe supports the State of New Mexico's effort to fulfill this long-awaited promise.

Thank you for providing me with the opportunity to express support for this legislation and the Gila River Indian Community's efforts to settle their water rights.

Sincerely,

ARLEN P. QUETAWKI, SR.,
Governor.

JOINT STATEMENT OF AUSTIN NUNEZ, CHAIRMAN, SAN XAVIER DISTRICT COUNCIL AND JULIE RAMON-PIERSON, PRESIDENT, SAN XAVIER ALLOTTEES ASSOCIATION

Chairman Murkowski, Chairman Campbell, and member of the committees, thank you for the opportunity to provide written testimony for the record on S. 437 and H.R. 885, the Arizona Water Settlement Act.

Title III of the Arizona Water Settlements Act contains amendments to the Southern Arizona Water Rights Settlement Act of 1982, P.L. 97-293, 96 Stat. 1261 (1982). These amendments are crucial to finalizing and implementing the Southern Arizona Water Rights Settlement Act (SAWRSA). The San Xavier District of the Tohono O'odham Nation, and the San Xavier Allottees Association, wholeheartedly support the enactment of the Arizona Water Settlements Act, including Title III, the amendments to SAWRSA.

I. BRIEF HISTORY OF THE SAN XAVIER WATER RIGHTS ISSUE

Our ancient Tohono O'odham village of Wa:k has been located on the banks of the Santa Cruz River south of Tucson since time immemorial. In the Tohono O'odham language, "Wa:k" means "place where the water goes under." This is a reference to the fact that the reach of the Santa Cruz River at and above the village of Wa:k flowed perennially, but sank into the sand just below the village during certain parts of the year. The River disappeared due to certain geologic conditions at this point.

The San Xavier Indian Reservation was established by Executive Order in 1874 specifically to protect the lands and resources of our Wa:k Village from white settlement and appropriation. The Main (Sells) Papago Reservation was not established by Executive Order until 1916. The two executive order reservations are not adjacent. In 1937 the Papago Tribe (now Tohono O'odham Nation) adopted a constitution under the Indian Reorganization Act of 1934, which incorporated the San Xavier Reservation as one of eleven districts (local units of government) of the Papago Tribe. At no time was title to the lands and resources of the San Xavier Reservation ever conveyed to the Papago Tribe or the Tohono O'odham Nation.

The perennial water supply for our village was used for domestic water supply, livestock and approximately 2300 acres of irrigated agriculture. River flows began to diminish as early as the 1890s due to non-Indian appropriations of surface flows and groundwater pumping. The River finally disappeared completely in the 1960s due primarily to the overdrafting of groundwater by the City of Tucson. The groundwater level on our Reservation dropped steadily until we had to completely abandon irrigated farming in 1986 because our irrigation wells became unproductive. The actual damages to our community and our community members and farmers resulting from the loss of our agricultural economy and the destruction of approximately 3500 acres of native mesquite and cottonwood forest in the river floodplain have never been computed or compensated.

The case of *United States v. Tucson* was filed in 1975 to enjoin the City from continuing to appropriate and deplete our groundwater supply. It was filed as a class action by the United States as Indian trustee on behalf of the Papago Tribe and all individual Indian trust allotment landowners on the San Xavier Reservation, and included two named class representative plaintiffs. 98% of the land with appurtenant water rights encompassed by the litigation is individually owned. The 1982 Southern Arizona Water Rights Settlement Act was intended to resolve the litigation. It was unsuccessful because the individual Indian allotment landowners were not included in the settlement negotiations, and insufficient benefits were allocated to the San Xavier District and the landowners in the settlement. The class action representative plaintiffs refused to consent to the dismissal of *United States v. Tucson,* and initiated the negotiation of amendments to SAWRSA. The landowners also filed two additional lawsuits to protect and fully assert their claims— *Alvarez v. Tucson* and *Adams v. United States.* All three lawsuits will be dismissed to finalize and implement SAWRSA as amended.

The individual landowners, the San Xavier District and the Tohono O'odham Nation government (formerly the Papago Tribe) first negotiated a resolution of their differences, and then entered into broader negotiations with other affected parties for acceptable amendments to SAWRSA that benefit everyone. These amendments are Title III of the Arizona Water Settlements Act. The major provisions of both the 1982 SAWRSA and Title III are summarized in the testimony of Vivian Juan-Saunders, Chairperson of the Tohono O'odham Nation.

II. SAN XAVIER DISTRICT AND ALLOTTEES' POSITION

At the outset of negotiations to amend SAWRSA, the San Xavier Allottees Association and the San Xavier District identified the following negotiation objectives:

A. Permanently restore and stabilize the groundwater table beneath the San Xavier Reservation.

B. Restore the flow of water in the Santa Cruz River on the San Xavier Reservation.

C. Restore up to 3500 acres of the Santa Cruz River riparian habitat, including the historic mesquite and cottonwood forest.

D. Confirm a "first right of beneficial consumptive use" to a total of 35,000 acre-feet annually of SAWRSA CAP water and groundwater to the San Xavier District subject to a Water Management Plan and regulation under the Tohono O'odham Nation Water Code. The San Xavier District, the San Xavier Cooperative Association and the allottees could pump or take direct delivery of this water for beneficial consumptive uses on the San Xavier Reservation only.

E. Any part of the 35,000 acre-feet annual allocation not consumptively used by the District Coop Farm allottees on the San Xavier Reservation could be used for recharge to Reservation aquifers.

F. 15,000 acre-feet of SAWRSA CAP water would be subject to the use and allocation of the Tohono O'odham Nation under the Nation's Water Code, and could be leased off-Reservation for the sole financial benefit of the Nation on a call-back basis. Any part of the 35,000 acre-feet of annual allocation to the District not required by the District Coop Farm allottees could also be leased for the financial benefit of the Tohono O'odham Nation.

G. The Tohono O'odham Nation would receive in lieu groundwater recharge credits of 10,000 acre-feet annually, plus direct recharge credits for whatever amounts of District and Nation SAWRSA CAP water is recharged, less the amount of groundwater consumptively used within the District. Such credits could be used or sold by the Nation for its sole financial benefit.

H. The Nation could use up to 16,000 acre-feet of SAWRSA CAP water not required by the San Xavier or Schuk Toak Districts for the San Lucy Farm.

I. ASARCO to stop pumping San Xavier Reservation groundwater pursuant to its leases and use SAWRSA CAP water provided by the Nation as a substitute water supply.

J. The 9B Farm would be cashed-out to create a fund representing past damages for trespass to San Xavier water rights. The fund would be held in trust by the San Xavier District to be used for the benefit of its members, residents and allottees. The fund would be used for agricultural and water development projects, and social services for San Xavier District members, residents and allottees.

K. The United States' obligations to rehabilitate and extend the San Xavier Cooperative Farm based upon an extended Farm of 2289 acres could be carried out by or under contract with the Bureau of Reclamation, or contracted to the San Xavier Cooperative Association.

L. $5 million each for working capital for the San Xavier Coop Farm and the Schuk Toak Farm would be provided from the proceeds of leasing water to Tucson and the existing SAWRSA § 313 Cooperative Fund.

M. The Allottees District would have access to the Nation's SAWRSA CAP water in addition to the Allottees' 35,000 acre-feet of SAWRSA CAP water if additional water is required by the District Coop Farm allottees for beneficial, consumptive uses on the Reservation.

N. San Xavier Reservation groundwater and SAWRSA CAP water recharge would be managed so as to guarantee a permanent supply to the District allottees of the maximum possible quantity of high quality local groundwater.

O. Damages for non-delivery of SAWRSA CAP water would go to the on Reservation users of such water.

P. Per capita distributions of any of the funds would be prohibited.

Q. *United States v. Tucson, Alvarez v. Tucson* and *Adams v. United States* would be dismissed pursuant to settlement agreements and the SAWRSA amendments. The City of Tucson and the other defendants would be asked to commit to a water management plan for the Upper Santa Cruz River Basin that would guarantee that the groundwater aquifer on and near the San Xavier Reservation would not be depleted in the future.

R. The Nation and the Schuk Toak District would have the right to pump a maximum of 3200 acre-feet of groundwater per year in the Eastern Schuk Toak Reservation. The Nation would acquire in lieu groundwater recharge credits for any water not pumped. These credits could be sold by the Nation for use off-Reservation.

Most of these objectives are met by the SAWRSA Amendments. Notably, the objectives stated in items a, b and c will not be met. Although the San Xavier District has undertaken a riparian habitat restoration project in the Santa Cruz River, the restoration of river flows and large areas of the native riparian habitat appears to be impossible. These important resources and amenities have been permanently destroyed.

III. WATER RIGHTS OWNERSHIP AND ALLOCATIONS AS BETWEEN THE TOHONO O'ODHAM NATION AND INDIVIDUAL INDIAN TRUST ALLOTMENT LANDOWNERS

The individual Indian trust allotment landowners on the San Xavier Reservation, and the San Xavier District Council, opposed the dismissal of *United States v. Tucson* and the implementation of the 1982 SAWRSA primarily because the water rights ownership interests of the individual Indian trust allotment landowners were not recognized in SAWRSA and their right to use SAWRSA water supplies and

groundwater on their allotments was not expressly protected. Additionally, there was a critical imbalance in the allocation of settlement benefits as between the Tohono O'odham Nation on the one hand, and the Indian allotment landowners and the San Xavier District on the other. Despite the loss of the traditional Wa:k Village agricultural economy, the loss of perennial flows in the Santa Cruz River, and the complete destruction of the community's large native cottonwood and mesquite bosque and riparian habitat, the settlement included no past damages for the landowners or the community. The lack of an element of past damages in the settlement has been remedied by giving the San Xavier District the option to cash-out the federal obligation under the 1982 Act to build a new, irrigated farm on the San Xavier Reservation to create a trust fund to provide governmental services and economic development.

Sections 307(a)(1)(G) and 308(a), (b) and (c) of S. 437/H.R. 885 are intended to quantify and statutorily guarantee a just and equitable distribution of water on the San Xavier Reservation and guarantee the availability of SAWRSA Central Arizona Project water and local groundwater to individual Indian trust allotment landowners for any and all beneficial uses, although the Tohono O'odham Nation and the San Xavier District will continue to exercise their respective jurisdiction and authority under tribal law to regulate the use and allocation of water on the Reservation. Although the authority of the Secretary of the Interior under 25 U.S.C. § 381 "to secure a just and equal distribution . . . [of water] among the Indians residing upon any such reservations: . . . ." is limited to ensuring a just and equal distribution of water for irrigated agriculture, the intent of the drafters of Section 307(a)(1)(G) is to ensure the availability of SAWRSA settlement water to individual Indian trust allotment landowners for any and all beneficial uses.

IV. GROUNDWATER PROTECTION

We are not confident that the water table will be restored and stabilized on the San Xavier Reservation because of continuing groundwater pumping by the City of Tucson in adjacent areas and because of continuing regional groundwater decline. The Tohono O'odham Settlement Agreement will implement SAWRSA as amended. Exhibit 8.8 to the Settlement Agreement is a proposed concept for a Groundwater Protection Program for the vicinity of the San Xavier Reservation to be implemented under state law as part of the SAWRSA settlement. The Tohono O'odham parties have not accepted all of the provisions of the concept as described in Exhibit 8.8 at the time of introduction of S. 437/H.R. 884. We have proposed a different version of the Concepts for Groundwater Protection Program, but it has not yet been accepted by the other parties. Our position on the Groundwater Protection Plan is attached to this testimony.

MEMORANDUM OF LUEBBEN, JOHNSON & YOUNG, LLP, ALBUQUERQUE, NM

Prior to March, the Tohono O'odham Nation SAWRSA Task Force had never carefully reviewed or reacted to Exhibit 8.8 to the Tohono O'odham Settlement Agreement. This is still an open issue. The TON SAWRSA Task Force has drafted the following as an alternative concept proposal for the SAWRSA Groundwater Protection Program.

EXHIBIT 8.8

CONCEPTS FOR GROUNDWATER PROTECTION PROGRAM

The terms used herein shall have the meanings defined in paragraph 2 of the Tohono O'odham Settlement Agreement. In addition, the term "Non-exempt Well" means a well that is not an "Exempt Well" and the term "Replacement Well" means a well no further than 660 feet from an existing well being replaced that will not annually withdraw in excess of the historical withdrawals from the original well or as that term is defined in future ADWR well-spacing regulations if the distance of the replacement well from the original well is less than 660 feet.

The basic elements of the Groundwater Protection Program ("Program") referenced in paragraph 8.8 of the Tohono O'odham Settlement Agreement are as follows:

1. Written consent of the Nation shall be required for the permitting of any new Non-exempt Well, for which the projected 10-feet-within-5-year drawdown contour (as determined by a well-spacing analysis done under state regulations by ADWR) intercepts the border of the San Xavier Reservation.

2a. In addition to the requirements of paragraph 1, an applicant for a permit to drill a proposed well of over 300 gpm [note: approx. 500 afa] capacity, or for a group of wells of over 300 gpm total capacity, to be located within two miles of the exterior boundaries of the San Xavier Reservation shall submit to ADWR both of the following; or, in the alternative, the Nation's written consent:

i. Evidence based on annual water level data collected during the five years prior to the permit application date showing:

I. if the proposed well is within one mile of the Reservation, that the water levels at the proposed well site(s) are declining at less than an average rate of one foot per year; or

II. if the proposed well is within two miles of the Reservation, but is further than one mile from the Reservation, that the water levels at the proposed well site(s) are declining at less than an average rate of two feet per year;

ii. Evidence showing that a projected 5-feet-within-5-year drawdown contour does not intercept the border of the San Xavier Reservation.

2b. In determining the average annual water level change at a proposed well site and the projected drawdown effect of the proposed well(s) for purposes of obtaining a permit under this paragraph, the water-level effects of underground storage facilities within the 2 mile limit and permitted recovery wells within that limit, except the water-level effects at the site of the proposed well of storage at said underground storage facilities by or for the direct benefit of the applicant within the 2 mile limit, shall be excluded.

2c. For purposes of this paragraph, if the same applicant submits an application for a permit to drill a well within eighteen months of a previous application, the applications shall be aggregated in terms of capacity and considered as an application for a group of wells.

3. Upon receiving an application for a permit to drill any Non-exempt Well located within two miles of the San Xavier Reservation, the ADWR shall mail to the Nation written notice of the application along with a copy of thereof. The Nation shall have 60 days after mailing of the written notice to file an objection to the application. The grounds for an objection are that the application fails to meet the standards required herein or that the granting of the permit will violate these standards. If objection is made, a hearing shall be held on the application within 60 days of receipt of the objection. The Nation shall be a party in such hearing. A recommendation based on the hearing shall be made by the hearing officer within 30 days after the close of the hearing. Within 30 days of the recommendation, the Director of ADWR ("Director") shall render his decision on the application. Any decision of the Director granting or denying a permit after objection by the Nation shall be subject to review by the Gila River Adjudication Court by an aggrieved party filing an application for review with the court within 30 days of mailing of the written notice of the decision of the Director on the application.

4. An applicant for a "Replacement Well" within two miles of the San Xavier Reservation shall be exempt from the requirements set forth in paragraphs 1 and 2 except that ADWR shall give notice thereof and provide the opportunity to object to the application and obtain review of the Director's decision thereon as provided in paragraph 3.

5. An applicant for a permit to drill an Exempt Well shall be exempt from the requirements set forth in paragraphs 1 and 2.

6. An applicant for a permit to drill a recovery well within two miles of the exterior boundaries of the San Xavier Reservation and within one mile of an underground storage facility shall be exempt from the requirements set forth in paragraphs 1 and 2 so long as the well is permitted only to recover storage credits accrued for water stored at that facility. The San Xavier Reservation shall have the same status as a service area and the Nation shall have the same status as a city, town, private water company or irrigation district under A.R.S. § 45-834.01.

7. This Program need not be described in detail in the SAWRSA Amendments, but the enactment of state legislation implementing the Program and authorizing ADWR's role in the Program will be a condition precedent to the Enforceability Date.

8. The judgment approving the Tohono O'odham Settlement Agreement should incorporate the salient provisions of this Program and the settlement will be made contingent on the passage of state legislation implementing the Program and authorizing the Director to enforce the Program as part of an ap-

proved Indian water rights settlement. Review of decisions of the Director will be part of the continuing jurisdiction of the Gila River Adjudication Court.

STATEMENT OF THE CITIES OF CHANDLER, GLENDALE, GOODYEAR, MESA, PEORIA, AND SCOTTSDALE, AZ

Chairman Murkowski, Chairman Campbell, and members of the subcommittees, the Arizona Cities of Chandler, Glendale, Goodyear, Mesa, Peoria and Scottsdale ("Cities") appreciate the opportunity to submit this testimony in support of Senate Bill 437 ("S. 437"). The Cities collectively represent more than 1.6 million people within the Phoenix metropolitan area of Maricopa County, Arizona. S. 437 is very important to the Cities and other water users throughout Arizona.

S. 437 approves the settlement of ongoing disputes over the past decade between the United States and Arizona interests concerning Central Arizona Project ("CAP") repayment and water allocation issues. S. 437 also approves the settlement of long standing disputes relating to the Gila River Indian Community water right claims. The Gila River Indian reservation includes a large land area of approximately 372,000 acres immediately south of the Phoenix metropolitan area where the Cities are located.

S. 437 resolves these contested CAP repayment, CAP water allocation and Gila River Indian Community water rights claims in a manner that is fair and equitable to all parties. S. 437 is important to the Cities and their future water management. It provides more certainty regarding the Cities' future water supplies while settling complex and contentious CAP and Indian water rights claims.

The Cities are contributing substantial financial and water resources to the Gila River Indian Community as part of the Gila River Indian Community Settlement. The City of Chandler is directly contributing 4,500 acre-feet of reclaimed water annually to the Gila River Indian Community as part of the Settlement. In addition, both Chandler and Mesa are annually contributing up to 8,100 acre-feet of additional high quality reclaimed water to the Gila River Indian Community as part of the Settlement. The Cities have contributed millions of dollars in treatment and delivery infrastructure to provide this water to the Gila River Indian Community at no cost to the Community or the United States. The other Cities are contributing tens of millions of dollars to the Settlement by leasing CAP water from the Community.

The Cities' consideration for the above contributions also includes the benefits the Cities are receiving under Title 1 of S. 437. The settlement of the CAP issues reflected in Title 1 of S. 437 is directly connected to the settlement of the Gila River Indian Community water rights claims.

Title 1 approves the reallocation of CAP water previously designated for allocation to Arizona municipal and industrial interests. Since the mid-1980's, 65,647 acre-feet of CAP water that was designated by the Secretary of Interior for allocation to Arizona's municipal and industrial sector has remained uncontracted. This represents enough water to serve a population of nearly 300,000 people. Despite the undeniable need for the water by Arizona's Cities and Towns, this water has remained unallocated because of various disputes between the United States and the Central Arizona Water Conservation District over the CAP repayment obligation and allocation of CAP water between Federal and non-Federal interests. S. 437 resolves those disputes and provides a final allocation of CAP water between federal and state interests in Arizona. Under Title 1 of S. 437, the Cities each receive a specific allocation of the uncontracted municipal and industrial CAP water, which is needed to serve their growing populations.

In addition, the Cities' municipal and industrial CAP subcontracts, like the Gila River Indian Community's CAP contract, will be expressly recognized as permanent service contracts with the existing delivery terms extended for 100 years. Title 1 of S. 437 also provides for the future allocation of 96,295 acre-feet of agricultural priority water to Arizona's municipal and industrial interests.

The settlement of the Gila River Indian water rights claims as approved by S. 437 accomplishes many objectives. First, the Settlement Agreement permanently settles all water rights claims of the Gila River Indian Community to both surface water and groundwater, including all appropriative rights, federal reserved rights and aboriginal rights. Second, it resolves disputes as to groundwater pumping, land subsidence and water quality. Third, it will provide the Gila River Indian Community with a significant water right to develop the Community's lands. Fourth, it will furnish the Gila River Indian Community with adequate financial resources to allow for the beneficial and productive use of the water resources provided by the Settlement. This settlement also will allow the parties, Native American and non-Native Amer-

ican, to plan for the future use and development of their water resources in cooperation rather than in conflict, and with certainty rather than uncertainty.

S. 437 also provides an additional 214,500 acre-feet of CAP water to be allocated to Federal interests in the State. This represents a significant transfer of water from non-Federal to Federal interests within Arizona. However, the Cities recognize that the transfer of this water will help resolve Indian water-rights claims, including the claims of the Gila River Indian Community and other Native American interests whose water rights claims have not yet been settled.

S. 437 also resolves significant claims against the federal government, some of which involve only the federal government and the Gila River Indian Community. S. 437 provides an important opportunity for the federal government to meet its trust obligations to the Native American communities involved while at the same time providing long term certainty regarding available Central Arizona Project Water ("CAP") supplies to both Native American and non-Native American interests in Arizona.

All parties to the CAP and Gila River Indian Community settlements benefit by settling their claims rather than continuing with protracted litigation. This settlement as approved by S. 437 provides extensive and creative mechanisms to accomplish all the parties' objectives. These mechanisms are unavailable through a court process. These creative mechanisms include exchanging reclaimed water for some of the Gila River Indian Community's Central Arizona Project Water and the Cities leasing CAP water from the Community. The settlement also includes the use of some state parties' water facilities to deliver water designated for the Community under the Settlement. This settlement provides for the parties to work together to accomplish their respective water use objectives and needs rather than continuing to devote substantial sums litigating over the nature and extent of CAP water allocation rights and the Gila River Indian Community's water rights.

The settlement of the CAP repayment and water allocation issues allows the parties to plan adequately for the future by eliminating uncertainty regarding available CAP water supplies and the Gila River Indian Community's water rights claims. The problems that Senate Bill 437 resolves are serious problems, both for Arizona and the federal government. S. 437 represents a fair settlement of the disputes over the CAP repayment and water allocation issues, and the Gila River Indian Community's water rights claims. We therefore urge your support of S. 437 and appreciate the opportunity to provide our written testimony to you.

STATEMENT OF JOHN F. SULLIVAN, ASSOCIATE GENERAL MANAGER, WATER GROUP SALT RIVER VALLEY WATER USERS ASSOCIATION AND SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT

Chairman Murkowski, Chairman Campbell and members of the committees, thank you for the opportunity to submit testimony in support of S. 437, the Arizona Water Settlements Act. My name is John F. Sullivan. I am the Associate General Manager, Water Group, of the Salt River Project ("SRP"), a large multi-purpose federal reclamation project embracing the Phoenix, Arizona metropolitan area. SRP is composed of the Salt River Valley Water Users' Association ("Association") and the Salt River Project Agricultural Improvement and Power District ("District"). Under contract with the federal government, the Association, a private corporation authorized under the laws of the Territory of Arizona, and the District, a political subdivision of the State of Arizona, provide water from the Salt and Verde Rivers to approximately 250,000 acres of land in the greater Phoenix area. Over the past century, most of these lands have been converted from agricultural to urban uses and now comprise the core of metropolitan Phoenix.

The Association was organized in 1903 by landowners in the Salt River Valley to contract with the federal government for the building of Theodore Roosevelt Dam, located some 80 miles northeast of Phoenix, and other components of the Salt River Federal Reclamation Project. SRP was the first multipurpose project approved under the Reclamation Act of 1902. In exchange for pledging their land as collateral for the federal loans to construct Roosevelt Dam, which loans have long since been fully repaid, landowners in the Salt River Valley received the right to water stored behind the dam.

In 1905, in connection with the formation of the Association, a lawsuit entitled *Hurley v. Abbott, et al.*, was filed in the District Court of the Territory of Arizona. The purpose of this lawsuit was to determine the priority and ownership of water rights in the Salt River Valley and to provide for their orderly administration. The decree entered by Judge Edward Kent in 1910 adjudicated those water rights and,

in addition, paved the way for the construction of additional water storage reservoirs by SRP on the Salt and Verde Rivers in Central Arizona.

Today, SRP operates six dams and reservoirs on the Salt and Verde Rivers in central Arizona, as well as 1,300 miles of canals, laterals, ditches and pipelines, groundwater wells, and numerous electrical generating, transmission and distribution facilities. The six SRP reservoirs impound runoff from a 13,000-square mile watershed. The water stored in these reservoirs is delivered via SRP canals, laterals and pipelines to municipal, industrial and agricultural water users in the Phoenix metropolitan area. SRP also operates approximately 250 deep well pumps to supplement surface water supplies available to the Phoenix area during times of drought. In addition, SRP provides power to nearly 800,000 consumers in the Phoenix area, as well as other rural areas of the State.

SRP holds the rights to water stored in its reservoirs, and for the downstream uses they supply, pursuant to the state law doctrine of prior appropriation, as well as federal law. Much of the water used in the Phoenix metropolitan area is supplied by these reservoirs.

SRP fully supports the enactment of S. 437 in its entirety. However, my testimony, offered today on SRP's behalf, is specifically directed to Title II of the bill, authorizing the Gila River Indian Community Water Rights Settlement.

The Gila River Indian Reservation was created by an Act of Congress in 1859 and was enlarged by seven separate Executive Orders in 1876, 1879, 1882, 1883, 1911, 1913 and 1915. Currently, the Reservation encompasses approximately 377,000 acres of land in central Arizona. Most of the lands within the Reservation are located within the Gila River watershed. The water rights appurtenant to these lands are subject to a consent decree entered by the United States District Court in 1935. The 1935 "Globe Equity Decree" adjudicated the rights to water from the main stem of the Upper Gila River above its confluence with the Salt River. The Decree entitles the United States, on behalf of the Indians of the Gila River Reservation, to divert 300,000 acre-feet of water annually from the Gila River. Historically, however, the Indian Community has received, on average, only about 100,000 acre-feet annually of its decreed entitlement, due to insufficient flows in the Gila River at the Reservation's diversion point.

A small portion of the Gila River Indian Reservation lies within the Salt River watershed, west of Phoenix and several miles downstream from SRP's reservoirs. Many of these lands were added to the Reservation in 1879. At that time, a group of Indians, commonly referred to as the Maricopa Colony, was living there. Since some time prior to 1900, these Indians diverted water from the Salt River for the irrigation of approximately 1,000 acres.

In 1901, the federal government, acting on behalf of the Maricopa Indians, brought suit in Arizona territorial court to stop nearby non-Indian irrigators from interfering with the waters used by the Indians. Some of the defendants named in the suit later became shareholders of the Association, after its incorporation in 1903. On June 11, 1903, Judge Kent issued the decree in *United States v. Haggard,* which adjudicated the Maricopa Indians' right to irrigate approximately 1,080 acres of land with water from the Salt River. In 1917, the Haggard decree was incorporated into the Benson-Allison decree, which also adjudicated water rights for lands not included in the original decree, located near the confluence of the Salt and Gila Rivers.

Other than the approximately 1,080 acres irrigated by the Maricopa Colony, and included in the *Haggard and Benson-Allison* decrees, no lands on the Gila River Indian Reservation have ever been directly irrigated using Salt River water. Despite this fact, in the mid-1980s, the Gila River Indian Community asserted claims for the Reservation in the pending Gila River Adjudication to approximately 1.8 million acre-feet of water annually from the Salt, Verde and Gila Rivers. More recently, the Indian Community amended its claims and now asserts the right to more than 2.7 million acre-feet of water annually from the Gila River, its tributaries and groundwater. These claims, which far exceed the combined annual flow of all of these rivers, are based on the federal reservation of rights doctrine and largely encompass potential future uses of water by the Indian Community on its Reservation.

Thus far in the Adjudication, the Community's attempts to prosecute its extremely large claims to the Salt and Gila Rivers have not met with success. The Superior Court in the adjudication recently concluded that the Community and the United States are estopped by a decision of the United States Court of Claims, entered decades ago, from asserting any claim to the Salt River other than for the 1,490 acres within the Maricopa Colony. An earlier decision of the Superior Court would limit Reservation lands within the Gila River watershed to their decreed entitlement under the Globe Equity Decree. The Indian Community and the United States have appealed both of these decisions of the trial court, and the Arizona Su-

preme Court is presently considering whether to accept review of these decisions. In the absence of the Settlement before these Committees today, the matter is likely to continue in litigation for some time. In the meantime, the uncertainty associated with the potential magnitude of the Community's rights to water from the Salt and Verde Rivers poses a threat to the rights of existing appropriators, including SRP.

In order to alleviate this uncertainty and assure the dependability of water supplies to the more than 3 million residents of Maricopa County in central Arizona, SRP initiated water settlement negotiations with the Indian Community and the United States in 1989. Over time, neighboring water users joined the negotiations, which were often complex and difficult. Fourteen years later, the Indian Community, the United States and local interests including SRP, spurred on by the leadership of Senator Kyl and former Secretary Babbitt, have reached a comprehensive settlement of the Community's water rights claims, benefiting water users throughout the Gila River Basin, in Maricopa, Pinal and Yavapai Counties. The settlement is embodied in the Settlement Agreement and legislation before these Committees today.

The Settlement resolves all outstanding water related litigation between the Gila River Indian Community and the other settling parties and settles, once and for all, the water rights of the Indian Community to surface water and ground water in the Gila River Basin. I have attached a summary of the components of the Settlement to my written testimony. However, a few important points, pertaining to the Community's use of Salt and Verde River water, will be discussed here.*

First. The Settlement recognizes the right of the United States, the Community, its members and allottees under the *Haggaa Decree,* as modified by the *Benson-Allison Decree,* to 540 miners inches of water from the Salt River. The Settlement also confirms that such rights shall be deemed fully satisfied by SRP's performance of its water delivery obligations under the Contract between the United States and the Salt River Valley Water Users' Association dated May 5, 1936, as amended. This Contract, commonly referred to as the Maricopa Contract, provides that SRP shall make available 5,900 acre-feet of water per year for diversion and use on Reservation lands with rights under the *Haggard Decree,* as modified by the *Benson-Allison Decree.*

Second. Under the Settlement, the Community also shall have an annual entitlement to SRP stored water in an amount varying from zero to 35,000 acre-feet, depending on SRP reservoir storage levels on May 1 of each year. The water will be transported to the Reservation via SRP's water delivery system, subject to certain delivery system capacity limitations specified in the Agreement. Water that is credited to the Community on May 1 of each year, but is not used by April 30 of the following year, may be carried over in storage for the Community's subsequent use, up to a maximum amount, specified in the Agreement, which may not be exceeded at any time. Moreover, in any single year, the Community will not be entitled to order more than 45,000 acre-feet total from the current year's entitlement and the Community's entitlement to "carry over" water from prior years. The Community will pay for the delivery of SRP stored water at 100 per cent of the cost per acre-foot of stored water for SRP shareholders. The Community's entitlement to SRP stored water will be phased in over a period of five years, commencing in the year diet the Settlement becomes enforceable.

Third. Subject to certain monthly and annual volume limitations, SRP has agreed to take delivery of CAP water to which the Community is entitled for use by SRP shareholders, in exchange for the storage of the same amount of Salt and Verde River water in SRP reservoirs for eventual use by the Community. This exchange is subject to the ability of SRP to divert and beneficially use the CAP water to which the Community is entitled. SRP will deliver exchange water ordered by the Community via the SRP water delivery system only after determining that the system capacity is not needed to fulfill water delivery obligations of SRP that predate the Settlement.

Fourth. SRP has agreed to accept delivery of CAP water to which the Community is entitled for direct delivery to the Reservation, via SRP's water delivery system. The direct delivery of this water to the Community also will be subject to the limits of SRP's water delivery system capacity, as discussed in the previous paragraph.

Fifth. Phelps Dodge Corporation has offered to transfer to SRP its right, title and interest in Blue Ridge Reservoir, including all rights to water developed by operation of the reservoir. If SRP accepts Phelps Dodge's offer and the transfer of water rights to SRP is accomplished under Arizona law, then SRP will provide to the Community a portion of the water stored behind Blue Ridge Reservoir, ranging from zero to 836 acre-feet annually, depending on reservoir storage levels in Blue Ridge

*The attachments have been retained in subcommittee files.

on May 1 of each year. Water that is credited to the Community on May 1 of each year, but is not used by April 30 of the next year will not be available for the Community's use in subsequent years. If SRP accepts Phelps Dodge's offer and obtains the right to water stored in Blue Ridge, there also may be an opportunity for municipalities in water scarce areas of Gila County, Arizona, to enter into agreements with SRP for the use of some of this water.

Sixth. The Settlement permits the continued use by the Community of water discharged into certain drain ditches by SRP, and provides for the contribution by SRP of $500,000 toward the cost of easements, construction, rehabilitation, operation and maintenance of these drain ditches on the Reservation.

Seventh. In exchange for these and other benefits to the Community, its members and allottees, the Settlement provides for the execution of a permanent, comprehensive waiver of the claims of these parties, and the United States on their behalf, for water rights, injuries to water rights and injuries to water quality, among others, as provided in exhibits to the Settlement Agreement. Of greatest significance, the waiver of all water rights claims by the Community, its members and allottees, and the United States on their behalf, extends to all water users in the Gila River Basin, including users who are not parties to the Settlement Agreement. Other parties to the Settlement Agreement will also execute waivers and releases of claims that these parties may have against the Community, its members and allottees, or the United States on their behalf, as specified in the Settlement Agreement.

In conclusion, we support the passage of S. 437, which is the culmination of the efforts of many people, over almost 15 years, to resolve these difficult issues regarding the allocation of an extremely scarce resource. Enactment of S. 437 is crucial to achieving certainty among users in central Arizona regarding water rights, and the dependable allocation of water supplies for the foreseeable future. We therefore strongly urge these Committees to recommend passage of the bill to the full Senate.

STATEMENT OF GEORGE RENNER, PRESIDENT, BOARD OF DIRECTORS, CENTRAL ARIZONA WATER CONSERVATION DISTRICT

Chairman Murkowski, Chairman Campbell, and members of the committees, the Central Arizona Water Conservation District is pleased to offer the following testimony regarding S. 437, the Arizona Water Settlements Act.

The Central Arizona Project or "CAP" was authorized by the 90th Congress of the United States under the Colorado River Basin Project Act of 1968 (Basin Project Act). The CAP is a multi-purpose water resource development project consisting of a series of canals, tunnels, dams, and pumping plants that lift water nearly 3,000 feet over a distance of 336 miles from Lake Havasu on the Colorado River to the Tucson area. The project was designed to deliver the remainder of Arizona's entitlement of Colorado River water into the central and southern portions of the state for municipal and industrial, agricultural, and Indian uses. The Bureau of Reclamation (Reclamation) initiated project construction in 1973, and the first water was delivered to central Arizona in 1985. In 2000, CAP delivered its full normal year entitlement of 1.5 million acre-feet for the first time, allowing Arizona to utilize its full Colorado River apportionment of 2.8 million acre-feet.

CAWCD was created in 1971 for the specific purpose of contracting with the United States to repay the reimbursable construction costs of the CAP that are properly allocable to CAWCD, primarily non-Indian water supply and commercial power costs. In 1983, CAWCD was also given authority to operate and maintain completed project features. CAWCD's service area is comprised of Maricopa, Pima, and Pinal counties, and includes the state's major metropolitan areas of Phoenix and Tucson. CAWCD is a tax-levying public improvement district, a political subdivision and a municipal corporation, and represents roughly 80% of the water users and taxpayers of the state of Arizona. CAWCD is governed by a 15-member Board of Directors elected from the three counties it serves. CAWCD's Board members are public officers who serve without pay.

Project repayment is provided for through a 1988 Master Repayment Contract between CAWCD and the United States. Reclamation declared the CAP water supply system (Stage 1) substantially complete in 1993, and declared the regulatory storage stage (Stage 2) complete in 1996. No other stages are currently under construction. Project repayment began in 1994 for Stage 1 and in 1997 for Stage 2. To date, CAWCD has repaid $685 million of CAP construction costs to the United States.

In 2000, CAWCD and Reclamation successfully negotiated a settlement of their $500 million dispute regarding the amount of CAWCD's repayment obligation for CAP construction costs. That dispute had been the subject of ongoing litigation in United States District Court in Arizona since 1995. The settlement includes a num-

ber of conditions that must be satisfied before it will become final, including completion of Indian water rights settlements for the Gila River Indian Community and Tohono O'odham Nation. Several of those conditions are addressed in S. 437.

TITLE 1—CENTRAL ARIZONA PROJECT SETTLEMENT ACT

Title 1 of S. 437 resolves a long-standing dispute between the United States and the State of Arizona regarding the allocation of CAP water. Title 1 also provides the water supplies and funding source that are necessary to complete Indian water rights settlements for the Gila River Indian Community (Title 2), the Tohono O'odham Nation (Title 3) and other Arizona tribes.

CAP Water for Indian Settlements

To provide water for Indian water rights settlements, Title 1 ratifies the Arizona Water Settlement Agreement among the United States, CAWCD and the Arizona Department of Water Resources. That agreement provides a framework under which non-Indian agricultural water users with long-term contract entitlements to CAP water will be allowed to relinquish their CAP entitlements in return for, among other benefits, relief from federal debt they incurred under section 9(d) of the Reclamation Project Act of 1939. Collectively, that 9(d) debt totals more than $158 million. Under the Arizona Water Settlement Agreement, CAWCD has agreed to pay about $85 million of that debt and the United States has agreed to forgive $73.5 million. Section 106 of S. 437 makes the 9(d) debt that the United States has agreed to forgive non-reimbursable and nonreturnable.

Section 106 also exempts land within the CAP service area from the Reclamation Reform Act and any other acreage limitation or full cost pricing provision of federal law. The Central Arizona Project was constructed to provide renewable water supply to agriculture to alleviate the significant groundwater overdraft in central Arizona. By limiting the agricultural lands that may receive CAP water, the Reclamation Reform Act operates to increase groundwater pumping in central Arizona. Thus, the exemption in section 106 is appropriate to help the CAP achieve its mission. This exemption also satisfies a condition to the relinquishment of the CAP non-Indian agricultural entitlements.

Title 1 directs the Secretary of the Interior (Secretary) to reallocate the CAP water relinquished by non-Indian agricultural contractors, with two-thirds going to facilitate pending and future Indian water rights settlements and one-third to the State of Arizona for future municipal and industrial (M&I) use. Ultimately, 47 percent of the CAP water supply will be designated for Indian uses, while 53 percent will be available for non-Indian M&I or agricultural uses. This represents an increase of 214,500 acre-feet in the amount of CAP water available for use by Indian tribes. This division of the CAP supply is intended to be final. No CAP water will be made available for future Indian settlements except as provided in Title 1.

Title 1 also prohibits the transfer or use of any CAP water outside the State of Arizona, except in the context of the interstate water banking program already established under regulations adopted by the Secretary of the Interior (Secretary). Title I also directs the Secretary to reallocate 65,647 acre-feet of currently uncontracted CAP M&I water to M&I water providers in Arizona. Both of these provisions are essential to CAWCD and its water users.

Funding for Indian Water Rights Settlements

To provide a funding source for Indian water rights settlements, Title 1 amends section 403(f) of the Basin Project Act to allow additional uses of certain funds deposited into the Lower Colorado River Basin Development Fund (Fund). The Fund is a separate fund within the U.S. Treasury established by Congress in the Basin Project Act, which authorized construction of the CAP. Revenues deposited into the Fund come from a number of sources, including: the sale of power from the Navajo Generating Station that is surplus to CAP pumping needs; a surcharge on power sold in Arizona from Hoover Dam and (beginning in 2005) Parker and Davis Dams; and other miscellaneous revenues from operation of the CAP. Under existing law and contract, these revenues are paid each year to the general fund of the Treasury to return the CAP construction costs that are reimbursable by CAWCD. To the extent that Fund revenues are insufficient to meet CAWCD's annual repayment obligation, CAWCD makes up the difference with a cash payment to the United States, which is also deposited into the Fund.

Title 1 does not affect the collection and deposit of revenues to the Fund. Nor does it affect CAP repayment or alter CAWCD's obligation to make cash payments sufficient to meet its annual repayment obligation for the CAP. Under Title 1, monies in the Fund will still be credited first against CAWCD's annual repayment obligation. But instead of being returned to the general fund, those funds may also be

used each year, without further appropriation, to pay costs of delivering CAP water to Indian tribes, constructing distribution systems to deliver CAP water to Indian tribes, and other costs authorized under Titles 2 and 3 of S. 437.

TITLE 2—GILA RIVER INDIAN COMMUNITY WATER RIGHTS SETTLEMENT ACT

Title 2 authorizes, ratifies and confirms a settlement of the water rights claims of the Gila River Indian Community (Community) that has been more than a decade in the making. This agreement is a significant step forward for Arizona that will settle longstanding litigation over the Community's water rights and provide much-needed certainty for state water management.

Of particular importance to CAWCD, Title 2 prohibits the lease, exchange, forbearance or transfer of CAP water in any way by the Community for use outside the state of Arizona.

TITLE 3—SOUTHERN ARIZONA WATER RIGHTS SETTLEMENT AMENDMENTS ACT

Title 3 resolves remaining disputes related to the Southern Arizona Water Rights Settlement Act, which was enacted by Congress in 1982 to settle the water rights claims of the Tohono O'odham Nation (Nation). Like the Community in Title 2, the Nation is expressly prohibited from leasing, exchanging, forbearing or transferring any of its CAP water for use outside the state of Arizona.

CONCLUSION

CAWCD strongly supports S. 437. Passage of this legislation will help bring closure to many longstanding disputes involving Arizona's water supplies.

STATEMENT OF TIMOTHY R. SNIDER, PRESIDENT, PHELPS DODGE MINING COMPANY

Chairman Murkowski, Chairman Campbell, and members of the committees, thank you for the opportunity to submit written testimony on S. 437, the Arizona Water Settlements Act ("the Act"), which includes in Title II an approval of the Gila River Indian Community Water Rights Settlement. The settlement constitutes a truly historic accomplishment on the part of the Gila River Indian Community ("the Community") and others who helped achieve it, and reflects more than a decade of hard work. Once enacted and implemented, the Act and the settlement will yield profound and beneficial results in Arizona and New Mexico; the Act and the settlement are as important to the region as the enactment of the legislation authorizing the construction of the Central Arizona Project in 1968.

Phelps Dodge Corporation ("Phelps Dodge") is a participant in the settlement, which is authorized by Title II of the Act. Indeed, Phelps Dodge was one of the first entities in Arizona to enter into a water rights settlement agreement with the Community, in an agreement that the Community and Phelps Dodge executed on May 5, 1998. A bill to approve the settlement was introduced in the United States Senate (S. 2608) in 1998. Bills to approve the settlement were introduced again in the Senate and the House of Representatives (S. 421 and H.R. 1944) in 1999. The Community and Phelps Dodge did not pursue the enactment of the legislation in 1998 or 1999, in order to achieve and participate in a more comprehensive settlement of the Community's water rights claims. That larger settlement is embodied in the master settlement agreement ("the Settlement Agreement") that will be signed by numerous Arizona water rights claimants, including Phelps Dodge, and approved by the Act. The 1998 settlement agreement between the Community and the Phelps Dodge has been revised and is incorporated into the Settlement Agreement.

Phelps Dodge has not yet executed the Settlement Agreement, not as a result of any unresolved issues with the Community, but as a result of several outstanding matters unrelated to the Community. These matters are expected to be resolved prior to the markup of S. 437.

The Act, once it becomes law, will significantly improve the fortunes of the Community and its members and will resolve long-standing disputes and litigation in Arizona, as well as important water supply issues in Arizona and New Mexico, to the ultimate benefit of all of the citizens of Arizona, New Mexico and the Southwest.

We thank you for the opportunity to submit this testimony and look forward to working with the parties to the Settlement Agreement to achieve its successful execution, approval and implementation.

STATEMENT OF DOUGLAS MASON, GENERAL MANAGER, SAN CARLOS IRRIGATION AND DRAINAGE DISTRICT, COOLIDGE, AZ

Chairmen Domemici and Campbell and Members of the Committees, the San Carlos Irrigation and Drainage District (District) is pleased to submit this testimony supporting the enactment of S. 437, the Arizona Water Settlements Act. Our support for enactment reflects the efforts of many parties that have collaborated to bring this settlement to the point where the Congress can consider enactment of the authorizing legislation of particular note are the efforts of Senator Jon Kyl of Arizona, who has been instrumental in bringing the parties together to structure innovative solutions to what had been considered to be intractable disputes.

Although the broad fabric of the Settlement is complete, two areas continue to be completed through ongoing negotiations. These include: (1) finalization of arrangements for water users in New Mexico to use the 18,000 acre-feet per year of Central Arizona Project water that was promised in the 1968 Colorado River Basin Project Act and (2) completion of agreement language defining the rights of water users in the Upper Gila River valleys near the communities of Duncan and Safford in western New Mexico and eastern Arizona. This District is participating in those discussions. With conclusion of those two items and any necessary conforming changes to the Settlement Agreement and the legislation, the Bill will be ready for enactment.

From the perspective of this District, the Settlement accomplishes important objectives. They include:

1. Resolves decades of difficulties between District farmers and members of the Gila River Indian Community (Community) over how the Gila River water rights shared by the District and the Community are managed; this is accomplished by restructuring and simplifying how San Carlos Irrigation Project (Project) water is divided;
2. Vests in the District and the Community, through a Joint Control Board, operation and maintenance responsibility for the Project irrigation water delivery facilities;
3. Provides for the rehabilitation of Project irrigation water delivery facilities using moneys available in the Lower Colorado River Basin Development Fund that is to be made available through contracts between (1) the United States and the Community and (2) the United States and the District;
4. Provides that the District will use its available contracting authorities and workforce to cost-effectively complete the rehabilitation of all District and most Project Joint Works facilities;
5. Provides that 8,000 acre-feet per year of water conserved through rehabilitating District facilities will be made available to maintain a sustainable water supply for a minimum Project fish and wildlife pool in the San Carlos Reservoir;
6. Provides an option for the United States to use, for a future water rights settlement with the San Carlos Apache Tribe, an average of 10,000 acre-feet per year of water conserved through rehabilitating District facilities; and
7. Provides that the District will assume the obligation to repay that portion of District facility rehabilitation costs that are associated with the net new conserved water supplies received by the District and, further, provides that remaining costs will be non-reimbursable because the beneficiaries of those investments are tribal entities and fish and wildlife resources.

In conclusion, the San Carlos Irrigation and Drainage District supports enactment of S. 437 because it resolves historical disputes and establishes mechanisms where future disagreements can be resolved among the local interested parties without needing to involve the United States in such management decisions.

Along with myself, our General Counsel, Riney B. Salmon II and our Engineering Consultant, Michael J. Clinton will attend the Committee Hearing. We would be pleased to address any questions that arise about District participation in the Arizona Water Settlements Act and the associated Settlement Agre6ment.

Thank you for considering this testimony.

STATEMENT OF L. ANTHONY FINES, ATTORNEY FOR GILA VALLEY IRRIGATION DISTRICT AND DAVID A. BROWN, ATTORNEY FOR FRANKLIN IRRIGATION DISTRICT

Chairman Murkowski, Chairman Campbell, and members of the committees, thank you for the opportunity to advise the committees of our support of S. 437, the Arizona Water Settlements Act. We represent the Gila Valley Irrigation District and the Franklin Irrigation District. Both Irrigation Districts have been litigating for over 15 years with the Gila River Indian Community, the San Carlos Irrigation District and others in United States District Court regarding the Globe Equity No.

59 Decree. The Irrigation Districts have been litigating with the same parties for almost as long in Arizona State Court regarding the adjudication of all rights to the Gila River. After years of negotiations among the lawyers and technical representatives of the Gila River Indian Community, the San Carlos Irrigation District, and the lawyers and technical representatives for our clients, we have reached a resolution of the substantive issues between the Irrigation Districts and the Gila River Indian Community that will settle both court cases. We are confident that we will soon reach an identical resolution with the lawyers and technical representatives for the San Carlos Irrigation District.

We strongly support the Arizona Water Settlements Act which will make the settlement between the Irrigation Districts we represent, the Gila River Indian Community and the San Carlos Irrigation District possible.

STATEMENT OF GREG PIERCE, PRESIDENT, PALOMA IRRIGATION AND DRAINAGE DISTRICT

Chairman Murkowski, Chairman Campbell, and members of the committees, thank you for the opportunity to provide written testimony on Senate Bill 437—Arizona Water Rights Settlement Act. The Paloma Irrigation and Drainage District ("Paloma") respectfully submits these comments on behalf of its landowners in general support of the proposed Arizona Water Rights Settlement Act, and particularly Title II, the Gila River Indian Community Water Rights Settlement. Paloma appreciates and supports all of the parties' efforts to resolve Indian water rights claims, including those of the Community.

Paloma comprises approximately 65,000 irrigated acres of farmland in southwestern Maricopa County near Gila Bend along the Gila River downstream from the Gila River Indian Reservation. On behalf of its landowners, Paloma diverts Gila River water using the Gila Bend Canal and other diversion works to irrigate these farmlands. The landowners hold appropriative rights to water from the Gila River and its tributaries with priority dates as early as 1881, which are among the oldest water rights in Arizona.

Paloma has always supported the concept of offering to the Community a reasonable amount of water, and funds to apply that water to Reservation lands, and to resolve its claims against other water rights claimants in the Gila River Adjudication. For some time, Paloma and the Community have worked together to ensure that the water users situated downstream from the Reservation receive reasonable assurances that the proposed settlement will put an end to litigation with the Community, its members and allottees, and the United States on their behalf.

The provisions resolving litigation downstream from the Reservation are in the final stages of completion. Paloma will continue to support the proposed settlement provided the parties continue to work towards resolving these matters and the final settlement incorporates terms whereby the Community, its members and allottees, and the United States on their behalf, waive their claims against Paloma and its landowners in the same manner as the Community has done for other water claimants throughout the State.

Paloma and its landowners appreciate the efforts of the Community and other parties working to resolve the water rights litigation that has plagued Arizona for decades. Paloma looks forward to working with the parties and Congress to finalize a complete settlement. Thank you for your attention to this matter.

STATEMENT OF SKIP RIMSZA, MAYOR, CITY OF PHOENIX

Chairman Murkowski, Chairman Campbell, and members of the committees, the City of Phoenix, an incorporated municipality within Maricopa County, Arizona, greatly appreciates the opportunity to offer testimony in support of the Arizona Water Settlements Act, S. 437, which settles the long standing water rights claims of the Gila River Indian Community and disputes over water allocations and costs of the Central Arizona Project. The Settlement Act provides many benefits to Arizona Indian tribes, the federal government, the State of Arizona and the City of Phoenix, both directly and indirectly.

The linchpin of the Act is Title I, the Central Arizona Project Settlement. Title I settles disputes between the federal government and the State of Arizona over repayment obligations for the Central Arizona Project (CAP). It also divides CAP water between state and federal purposes. Most importantly, it provides a framework for the Gila River Indian Community Water Rights Settlement and future Indian water rights settlements in Arizona by providing funding sources and identifying water supplies that can be used to fill water budgets for those settlements.

If also insures that precious Colorado River water will remain within the State and be used for the benefit of its citizens. The State, Indian tribes and federal government all reap rewards from settlements.

Title I provides for long-term contractual commitments of CAP water to be capped at 1,415,000 acre-feet with 667,724 acre-feet going to Arizona Indian Tribes and the federal government. The remainder of the entitlement, 747,246 acre-feet goes to the State and non-Indian water users. The split of this entitlement is used as the basis of the State's repayment obligation for the Central Arizona Project. Agreement between the State of Arizona, the federal government and Arizona Indian tribes on this point is a major accomplishment that only could have come to closure in the context of the overall settlement package authorized in this bill.

The reallocation to Arizona's Municipal and Industrial CAP water users in the amount of 65,500 acre-feet has been a hotly debated issue between water users in the State of Arizona, the federal government and Arizona Indian Tribes. Title I provides that the City of Phoenix shall receive 8,206 acre-feet of CAP water from this pool. The City will pay over $500,000 in back capital charges to the Central Arizona Water Conservation District (CAWCD) when that reallocation is finalized. This is a critical component of the Arizona Water Settlements Act for the City of Phoenix. Other important provisions include the extension of the City's CAP subcontract for an additional 100 years, recognition that the contract is for permanent service and the creation of a formula for sharing CAP water between federal and non-federal water users in the event a shortage of Colorado River water for the Lower Basin States is declared. The City is not alone in the receipt of these benefits; they are available to all CAP subcontractors within Arizona.

The identification of water supplies for Arizona Indian tribes now, in the case of the Gila River Indian Community (Community) and in the future for Indian Tribes with unfulfilled water rights claims, will benefit tribes, the federal government and the State of Arizona. The ability to facilitate settlement of these claims is critical to the continued vitality of the State. Settlement of these claims will provide certainty and will avoid costly and protracted legal battles over water resources.

Perhaps the most important provision of the entire bill is Section 107 of the Act which: (1) amends the Colorado River Basin Project Act to allow for revenues deposited into the Lower Colorado River Basin Fund to be credited against the repayment obligation for the Central Arizona Project; (2) provides funding for the Gila River Indian Community and the Tohono O'Odham Nation settlements; (3) allows the federal government to meet its obligations to fund Indian tribes operation and maintenance costs for CAP water deliveries to tribes; (4) provides funds for construction of critical water delivery infrastructure for Indian tribes; and, (5) creates a mechanism to fund future Indian water settlements. This part of the Act provides an enormous collective benefit to the tribes, the federal government and for the State of Arizona and is an example of the forward thinking that went into the settlement package.

Title II, the Gila River Indian Community Water Rights Settlement, is the culmination of many years of intensive negotiations. The settlement is fair and equitable for the GRIC, the State of Arizona, the federal government and local municipal, corporate, agricultural, and private parties and was achieved only with tremendous amounts of give and take on all sides. The Indian Community is a reservation of over 350,000 acres located within Maricopa and Pinal Counties. The reservation is located immediately south of the City of Phoenix and shares a common border with the City of Phoenix of approximately twenty-two miles in length. It is the city's largest neighbor in terms of land area. The City of Phoenix has a population of over 1.4 million people. This settlement agreement has many benefits for both the Gila River Indian Community and the City of Phoenix. The success of the settlement negotiations has also opened up many doors between the two communities on other important issues as well, and successful passage of the Water Settlement Agreement and implementation of the settlement agreement will further enhance future cooperative efforts between the Gila River Indian Community and the City of Phoenix.

To provide some background to the settlement, the City and the Gila River Indian Community have been engaged in longstanding disputes over the rights to Arizona's most scarce and precious natural resource, water. The City and the Community are not alone in this regard. These disputes involve significant claims to water by surrounding cities and towns, the State of Arizona and the federal government. The settlement, which the City helped craft provides resolution for all these claims in a fair and equitable manner to all parties, including the federal government.

The nature and extent of the disputes deserves some explanation. The Indian Community primarily sits astride the Gila River. A portion of the Community also sits along the Salt River, a primary tributary to the Gila River. The Community contends that it has been denied by its neighbors, as well as by the actions and in-

actions of the federal government, to its fair share of the surface waters of the Gila River. More importantly to Phoenix, the Community claims that its fair share of the Salt River has been negatively impacted as well. For many years, the City of Phoenix has relied upon its water rights to the Salt River and its tributaries, through deliveries by the Salt River Project, for over 60% of its total water supplies.

The Community also claims that its groundwater resources have also been unduly impacted by pumping that occurs off the reservation. Numerous lawsuits against parties in the State, including Phoenix, have been filed by the Community and by the federal government on behalf of the Community.

Without this legislation the settlement will not become effective, and the parties including the federal government, will be forced to continue to litigate their disputes in court. A general stream adjudication to the rights of the Gila River and all its tributaries, the Gila River Adjudication, has been underway in Arizona since the 1970's. Without this bill the Community, the federal government and thousands of state parties will continue to have to assert and defend their claims in an expensive and lengthy process. This settlement solves that problem as well.

There is a clear need for settlement of all these disputes. This settlement is appropriate and it is fair to all parties including the federal government and the Indian Community. All parties have been well represented in negotiating it. The City of Phoenix, for its part, has given up some of its Salt River water supplies, for the benefit of the GRIC. The City will also lease 15,000 acre-feet per year of the Community's CAP water supply at an upfront cost of over $20,000,000. Congressional authority for the Community to lease its water is necessary and that authority is contained in this bill. Phoenix' contributions to the settlement package are significant as are the contributions of the other parties in Arizona. Reciprocal waivers of claims between the Community, the federal government and the City of Phoenix and other state parties are also a key part of this legislation and are a vital component of the settlement.

In summary, the City of Phoenix believes the Arizona Water Settlement Act is a fair, equitable and cost effective solution for the settlement of financial and water claims for the benefit of the State of Arizona and its citizens, Arizona Indian tribes and the federal government and urges its enactment.

STATEMENT OF VAN TALLEY, MAYOR, CITY OF SAFFORD, AZ

Chairman Murkowski, Chairman Campbell, and members of the committees, thank you for the opportunity to provide written testimony on Senate Bill 437—Arizona Water Rights Settlement Act. The City of Safford respectfully submits written testimony supporting the Gila River Indian Community Water Rights Settlement authorized in Senate Bill 437. On behalf of the residents of Safford, Arizona and customers of the City water system I express gratitude for your interest in our water problems.

Located along the bank of the Gila River upstream from the Gila River Indian Reservation, Safford is a growing city serving water to more than 20,000 people, including the Town of Thatcher and other neighboring communities in Graham County. As Southeast Arizona's commercial center, Safford, like other municipal, industrial and agricultural sectors, requires reasonable and reliable water supplies. The Gila River Indian Community Water Rights Settlement offers this security among the parties.

For decades, Safford has continued to work with water users in the Upper Gila River Valley, the United States, and Native American tribes and communities to resolve water quantity and water quality issues. For the past five years, the City, along with other parties, diligently worked to settle the Gila River Indian Community's water rights claims. The bill before you is the culmination of efforts resolving the Community's claims, which in turn saves the parties from uncertain, complex, and expensive litigation concerning water rights.

Like many other parties, one of the benefits Safford receives is certainty of water supplies and the ability to plan for the future accordingly. The Community and certain other parties confirm Safford's water rights that would otherwise be contested and litigated. The Settlement recognizes Safford's right to use 9,740 acre-feet of water per year and provides mechanisms to enable the City to meet higher demands. While Safford's water allocation is relatively small when compared to the Community's 653,500 acre-feet, it nonetheless assures Safford of water for present and reasonably foreseeable needs.

The Settlement also helps to enhance Gila River water quality while simultaneously providing Safford with a water source to meet additional demands. The Settlement authorizes the appropriation of funds to repay indebtedness on the City's

recently constructed state-of-the-art water treatment facility. Treated water may be returned to the stream to enhance stream flows and stream quality, or recharged to meet Safford's future water demands. The use of treated water is just one of the methods that Safford may implement to meet future needs without diminishing available water for other users and parties to the Settlement. To obtain these benefits, Safford agreed to a water budget of about one half of its claimed water rights.

The treatment plant and a dependable water supply for the benefit of Safford are just a few of the positive results that are being proposed in the Settlement. Dozens of cities and towns receive similar benefits. Agricultural and industrial interests may continue to operate with less litigation risk towards their water supplies. The Settlement also enhances and preserves land, wildlife, and the environment.

The Settlement with the Gila River Indian Community and Senate Bill 437 is a giant step in resolving the pending issues and confirming water rights among the parties to a limited supply of water. I urge the Committees and the Senate to pass this bill that will settle significant water rights in the State of Arizona and allow the Gila River Indian Community and many cities, towns, irrigation districts and others to plan for future growth with confidence and reliable water supplies.

STATEMENT OF THE MAYOR AND COMMON COUNCIL OF THE TOWN OF PAYSON, AZ

Chairman Murkowski and members of the subcommittee, the Town of Payson, Arizona, appreciates the opportunity to express its support for S. 437. The Town is a community of 14,500 residents, which is located an hour's drive northeast of the Phoenix metropolitan area in the scenic and cool pine county below the Mogollon Rim. Its climate and exquisite setting offer abundant blessings, in sharp contrast to the limited water supply available to the Town from the fractured granite aquifer underlying it. For decades the Town has strained to be a responsible steward of the water resources at its disposal, but the time is fast approaching when there simply will not be enough water to meet the demand.

The Town is especially pleased that S. 437 would confirm and ratify a settlement agreement facilitating an eventual transfer of Blue Ridge Dam and related facilities and water rights to the Salt River Federal Reclamation Project. It realizes that this transfer is not assured even if the legislation passes, and that such a transfer would be only the first of many important steps needed to make water from Blue Ridge Reservoir available to meet the Town's water supply needs. The Town has done what it can within its own governing structure, however, and it is critical that progress be made toward securing a renewable water supply.

We commend Senator Jon Kyl, his staff, and the parties to the settlement for their dedication. We urge this Subcommittee, the Committee on Energy and Natural Resources, the Indian Affairs Committee, and the full Senate to give S. 437 favorable consideration.

Thank you for considering our views.

STATEMENT OF DALLAS MASSEY, SR., TRIBAL CHAIRMAN OF THE WHITE MOUNTAIN APACHE TRIBE OF THE FORT APACHE INDIAN RESERVATION, STATE OF ARIZONA

TRIBE'S ABORIGINAL TITLE FROM TIME IMMEMORIAL

The White Mountain Apache Tribe currently has beneficial title, equivalent to fee-simple absolute, to over 1.6 million acres of its once much larger aboriginal territory in the east central highlands of the State of Arizona.[1] The Tribe's Fort Apache Indian Reservation was established by Executive Orders in 1871 and 1872. The Tribe has retained actual, exclusive, use and occupancy of its aboriginal lands, within the boundaries designated by the Executive Orders dated November 9, 1871 and December 14, 1872, without exception, reservation, or limitation since time immemorial. The Tribe has an unbroken chain of title and has retained said title to its lands. The Tribe's vested property rights, including its aboriginal rights to the use of waters, that underlie, border and traverse its lands have never been extinguished by the United States and are prior and paramount to all rights to the use of water in the Gila River drainage, of which the Salt River is a major affluent.

[1] Current Tribal membership is approximately 14,000 persons. The Tribe's Reservation population is projected to be 38,000 to 40,000 persons by 2050, and 102,000 by the year 2100.

THE TRIBE'S RESERVATION THE SOURCE OF SALT RIVER AND ITS NUMEROUS TRIBUTARIES

Except for a small portion of the Reservation that drains to the Little Colorado River Basin, virtually the entire Reservation drains to the Salt River. The headwaters and tributaries of the Salt River arise on the Tribe's Reservation: the north fork of the White River joins the east fork of the White River at Fort Apache which then joins the Black River to form the Salt River, the Tribe's southern most boundary and the northern boundary of the San Carlos Apache Reservation.

MEASURE OF TRIBE'S ABORIGINAL SALT RIVER RIGHTS ADEQUATE TO MEET PRESENT AND FUTURE REQUIREMENTS

The Tribe claims aboriginal, reserved water rights to Salt River water with a priority date of time immemorial in the amount of 260,000 acre feet annually.[2] That claim includes approximately 49,800 acres of practicably irrigable acreage (less than 3% of the Tribe's Reservation) with a water duty of 5.3 acre feet to the acre. In addition, the Tribe claims water to meet the projected population of the White Mountain Apache Tribe to the year 2100 of some 102,000 persons with attendant municipal, industrial and commercial water use. Currently, the Tribe has a ski resort/park, over 25 outdoor recreational lakes, two United States fish hatcheries on the reservation, several hundred miles of cold water streams, mineral deposits that have yet to be developed, including gravel, gypsum and high grade iron ore, and hundreds of thousands of acres of commercial pine and spruce timber stands which supply commercial grade timber for the Tribe's sawmill which produces 60 million board feet annually.

The Tribe's water rights remain unquantified, although the United States in its capacity as the Tribe's as Trustee, has filed a claim in the name of the United States for approximately 175,000 acre feet of Salt River water in the Gila River General Stream Adjudication now pending in the Mancopa County Superior Court, State of Arizona.[3] The United States has Amended filings in the Little Colorado River and the Gila River General Stream Adjudications in September 2000, to assert the Tribe's aboriginal and priority rights to the transbasin aquifer sources necessary to sustain the base flow of the springs and streams on the Tribe's Reservation. These two claims filed by the United States as Trustee specifically recognize the Tribe's unbroken chain of aboriginal title and time immemorial priority rights to the base flow of the springs and streams as well as surface water contributed by rainfall and snowfall runoff on the Tribe's Reservation.[4]

The Tribe's retained rights are continuing against the United States and its grantees as well as against the State of Arizona and its grantees. See *United States v. Winans,* 198 U.S. 371, 382 (1905). Thus, the Tribe's priceless aboriginal Salt River rights to the use of water are an interest in real property of the highest dignity and a right recognized by the United States Supreme Court, and by the Arizona Supreme Court in the Gila River General Stream Adjudication, 171 Ariz. 230, 830 P.2d. 442,447 (1992), in which that Court declared that water rights are property rights.

The Court of Federal Claims has found as a matter of fact that prior to the establishment of the Tribe's Reservation in 1871-1872, the White Mountain Apache Tribe exercised its aboriginal rights to the use of water in the Salt River and the tributaries of that stream for purposes of agriculture, including the production of corn, wheat, beans, and vegetables in quantities sufficient to satisfy "an estimated twenty-five percent" of the Tribe's diet. *White Mountain Apache Tribe v. United States,* 11 CI.Ct. 614, 622, See, Plate in that case displaying Salt River drainage within Fort Apache Indian Reservation, at 623. The Court of Federal Claims also declared as a matter of law, that the Tribe had vested in it, title to Winters Doctrine rights

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[2] The Tribe's aboriginal rights to the use of water on its lands include all beneficial uses, whether for livestock, agriculture or for the "arts of civilization". See *Winters v. United States,* 143 Fed. 740 (CA9, 1906); 143 Fed. 684 (CA9, 1906), *Winters v. United States,* 207 U.S. 564, 576 (1908); *Arizona v. California,* 373 U.S. 546,599-601 (1963).

[3] The United States has also filed a claim in the Little Colorado River General Stream Adjudication as the Tribe's Trustee. To date, the Tribe has not intervened as a party in either adjudication nor has settlement been sought, but the Tribe has taken steps throughout its history to protect and preserve its reserved and retained water rights.

[4] The United States officially acknowledges that Indian water rights are vested property rights for which the United States has a trust responsibility, with the United States holding legal title to such water in trust for the benefit of the Indian people. See for example, "Preamble to Department of Interior Policy Statement, Working Group in Indian Water Settlements; Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Claims", 55 FR 9223 (March 12, 1990).

to the use of water in die Salt River and the tributaries of that stream, *White Mountain Apache Tribe v. United States,* 11 CI.Ct. 614, 638 (1987), and that the Tribe's aboriginal rights were prior to and paramount to the claims asserted for the Salt River Project by the Salt River Valley Water Users Association, *Ibid.* See also, *Winters v. United States,* 207 U.S. 564, 576 (1908), "fundamentally, the United States as Trustee for the Indians, preserved . . . the title to the rights to the use of water which the Indians [as here] had 'reserved' for themselves". The White Mountain Apache Tribe may exercise its aboriginal, reserved, and retained Salt River rights for any beneficial purpose, including but not limited to, aboriginal rights to the use of water, all surface water, percolating water, groundwater, forests, range lands, fisheries, wild life, aesthetics, and all other constituent elements of which an estate in fee simple absolute title is comprised.

The Tribe recognizes that full development of the Tribe's rich natural resources, referred to above, must be predicated upon the exercise of the Tribe's aboriginal Salt River rights to the use of water for a vast variety of uses, involving municipal, domestic, mineral, industrial, recreation, and all other related uses. All of the foregoing is necessary to fulfill the commitment by the Tribe's Trustee, the United States, that the Tribe's permanent homeland would be both an economic and socially acceptable area in which the Tribe may live and prosper for all time and for all purposes.

The White Mountain Apache Tribe, is seeking to achieve in cooperation with its Trustee, the United States, without interference from the State of Arizona, a sound, economic, and social base, which can only be achieved if the Tribe is also free to exercise its Salt River rights to the use of water in its broad programs to revitalize its severely damaged range and forest lands caused by the mismanagement of its Trustee, and to fully develop a self-sustaining, stable economic and social community that will guarantee the perpetuation now and in the future of the Tribe's range lands, forest lands, minerals, surface and ground waters and all other resources for the benefit of the Tribe and its members now and in perpetuity.

ARIZONA WATER SETTLEMENT ACT S. 437

It is within the foregoing context that the Tribe has grave concerns about the impact of the Arizona Water Settlement Act (as presently drafted) on its vested and reserved water rights. The White Mountain Apache "tribe submitted comments for the Environmental Impact Statement on the reallocation of the CAP water supply, to the effect that depletion by the White Mountain Apache Tribe and other Indian Tribes of waters in the Salt River System should be considered in regards to the reallocation of CAP water.[5] Specifically, that reallocating 200,000 acre feet of non-Indian agricultural CAP water in an already over appropriated and water bankrupt delivery system presupposes that there will be no depletion by the White Mountain Apache Tribe of any waters within the Salt River drainage. It is imperative, however, that there must be sufficient water remaining in the Salt River System pursuant to S. 437 to fulfill a decreed water right from the Gila River Adjudication or a future settlement of the Tribe's water rights.

The proposed reallocation of 200,000 acre feet of non-Indian agriculture rights to Central Arizona Project water to facilitate settlement of the Gila River Indian Community and Tohono O'odham Nation's water rights claims, ignores the upstream, prior and paramount water rights of the White Mountain Apache Tribe a portion of which has been filed by the Tribe's Trustee, the United States, and the depletion impact of the Tribe's water use on junior, downstream, non-Indian water users in the Phoenix Valley. The apparent reliance by the Phoenix Valley, primarily the Salt River Project on no depletion of the Salt River by the White Mountain Apache Tribe imposes exponential political and judicial pressure to deprive the Tribe of its vested property right to the use of water for a self-sustaining homeland now and into the future.

FUTURE WATER AVAILABILITY AND S. 437 DEPENDENCE ON MINIMAL FUTURE USE BY WHITE MOUNTAIN APACHE TRIBE

Table 1, page 12, *infra,* summarizes the water supply and projected water demands for the Phoenix Active Management Area (AMA) through year 2025. The source of information for each of the entries is provided from state and federal agencies as identified in Table 1. The analysis presented below draws attention to the dependence of the future water supply on minimizing future water use, and con-

[5] See comment B, p. 2-14, Draft Environmental Impact Statement, June 2000, Volume 2, Technical Appendices A-H. "Allocation of Water Supply and Long Term Contract Execution", Central Arizona Project, U.S. Department of Interior, Bureau of Reclamation.

sequently, growth and economic development on the Fort Apache Indian Reservation.

The future sources of water supply for the Phoenix AMA are CAP (Central Arizona Project), Salt River, Gila River, Agua Fria River, wastewater effluent and groundwater. As shown in Table 1, those sources provide a supply of 2,618,923 acre-feet annually, including an overdraft from groundwater of 430,757 acre-feet annually.

CAP water supplies are part of the amount of water allocated to Arizona in the Lower Colorado River Compact. The total available to Arizona by Compact is 2.8 million acre-feet annually, as confirmed in *Arizona v. California,* and the amount provided by CAP is 1.5 million acre-feet annually at the point of diversion on the Colorado River. Transmission losses (85,000 acre-feet annually) reduce the amount of water available for contract by the Secretary of Interior through CAP to 1,415,000 acre-feet annually:

> In passing the Boulder Canyon Project Act, Congress intended to, and did, create its own comprehensive scheme for the apportionment among California, Arizona, and Nevada of the Lower Basin's share of the mainstream waters of the Colorado River, leaving each State her own tributaries. It decided that a fair division of the first 7,500,000 acre-feet of such mainstream waters would give 4,400,000 acre-feet to California, 2,800,000 to Arizona, and 300,000 to Nevada, and that Arizona and California should each get one-half of any surplus. Congress gave the Secretary of the Interior adequate authority to accomplish this division by giving him power to make contracts for the delivery of water, and by providing that no person could have water without a contract. (*Arizona v. California,* No. 8, Original, Decided June 3, 1963, 373 U.S. 546, p. 546.)
>
> The CAP was constructed to annually deliver 1.415 . . . MAF of Arizona's allocation of Colorado River water to central and southern Arizona although up to 1.8 MAF can be delivered through the CAP aqueduct if it is used at maximum capacity. . . . This represents the volume of CAP water allocated to Arizona, 1.5 MAF, reduced for transmission losses. Supplies can also be reduced when there is drought on the Colorado River. CAP supplies have the lowest priority on the Colorado system and would be the first to be reduced in drought conditions. Conversely, when there is a surplus declared on the Colorado River, more water could be delivered. Governor's Water Management Commission, November 19, 2000, Availability, Reliability and Utilization of Renewable Supplies, p. 4, and footnote 2).

The total amount of water available for CAP on a long-term average is estimated by others at 1,298,000 acre-feet annually:

> . . . The DWR and Bureau agreed to use Bureau hydrologic Sequence number ten for analysis purposes in this EIS. This sequence produces a long-term average Colorado River water availability of 1,298,000 acre feet per year while the average of all 15 sequences is 1,144,000 acre feet per year. Within the 15 Bureau sequences, average Colorado River water availability varies between 742,000 acre feet per year and 1,523,000 acre-feet per year. . . . (Bureau of Reclamation, March 19, 1982, Central Arizona Project, Water Allocation and Water Service Contracting, Final EIS, p. 10).

This is remarkably consistent with the conclusion reached by the White Mountain Apache Tribe that only 1,279,000 acre feet per year can be supplied by the Central Arizona Project at 1980 levels of development.

Differences exist between the ADWR and Reclamation estimates. According to the Final EIS on CAP allocations, the differences resulted from the procedural methodologies employed by each agency and assumptions regarding the estimates of future water resources developed in the Upper Colorado River Basin states, delivery system losses, dependable yield from the Salt and Gila Rivers, and other hydrologic factors. ADWR estimates of depletions, uses, and losses were generally less than Reclamation estimates. ADWR estimates of dependable tributary yields and depleted inflows were generally greater than Reclamation estimates.

Assuming an average CAP water supply of 1,289,000 acre-feet annually, shortages can be expected 38% of the years, and shortages could run continuously for up to 20 years. (CAP Final EIS, pp. 9 and 10). The water supply allocations in the CAP Final EIS also assume water developed on the Salt and Verde Rivers with a functional equivalent of Orme Dam on the Verde River and Buttes and Hooker Dams on the Gila River (CAP Final EIS, p. 6). The Roosevelt enlargement was implemented as an alternative, and perhaps a functional equivalent, to Orme Dam. Buttes and Hooker Dams have not been built on the Gila River system. Therefore,

the ability to sustain a long-term average of 1,289,000 acre-feet annually with shortages in 38% of the years is an overstatement of the reliability of the current supply based on information collected to date.

The Salt River Project (SRP) modeled the Salt River (Salt and Verde Rivers at Granite Reef Dam) (a) before (1995) and (b) after (1997) the enlargement of Roosevelt Dam. SRP determined an average annual Salt River supply before the Roosevelt Dam enlargement of 833,000 acre-feet annually and after the enlargement of 906,800 acre-feet annually (Arizona Department of Water Resources, Phoenix AMA, Section III, Future Conditions and Directions, Chapter 11, Water Budgets and Projections, p. 11-9). These estimates are assumed different than the estimates by ADWR when the CAP Final EIS was in preparation. The assumptions in either the SRP of ADWR estimates are unknown but allocate all of the water supply created by enlargement of Roosevelt Dam to the Phoenix AMA. The level of future depletions assumed by SRP and ADWR on the Salt and Verde Rivers are not known and are of considerable interest to the White Mountain Apache Tribe. Did SRP and ADWR assume no future level of depletion on the Fort Apache Indian Reservation and what level of future depletion was assumed if greater than the current level of depletion?

The Gila and Agua Fria Rivers add 92,963 and 32,308 acre-feet annually to the water supply for the Phoenix AMA, far less than the 906,800 acre-feet annually provided by the Salt River with Roosevelt enlargement. Effluent in the Phoenix AMA accounts for an additional 159,447 acre-feet annually (Table 1). Groundwater pumping will continue with an estimated pumping requirement of 999,237 acre-feet annually, which will be offset by natural recharge, incidental recharge, replenishment, artificial recharge and other factors that will presumably reduce the total pumping to an overdraft amount of 430,757 acre-feet annually (ADWR, Chapter 11, pp. 11-10). There is a serious question with respect to the level of projected overdraft and whether the overdraft amount is acceptable under the authorizing legislation of CAP. This is a question requiring further investigation.

The total water supply to the Phoenix AMA is projected at 2,618,923 acre-feet annually, to be fully consumed by the demand for the Phoenix AMA estimated to range from 2,400,000 to 2,900,000 acre-feet annually with a mid-range demand level of 2,624,844 acre-feet annually as given in Table 2, see page 13, *infra.**

Notable in Table 1 is the presentation of population projections for Maricopa County (see bottom of Table 1). The 2000 projection was 2,900,000 persons, and the 2000 census reports 3,072,000 persons. This draws into question the projection of 3,700,000 for year 2010, which may be under-estimated, as well as the potentially under-estimated projection of 4,483,000 persons for year 2025.

There is a need for congressional or judicial review to determine (1) whether the expectations of the authorizing legislation of Central Arizona Project relating to groundwater pumping are being met, (2) the level of dependence on the Salt River water supply of 906,800 acre feet annually without future use by the White Mountain Apache Tribe and (3) whether the water supply, considering all sources, is available in sufficient quantities for the regulatory agencies of the State of Arizona to permit a continuation of unrestrained subdivision in the Phoenix AMA at the current levels of water conservation, or lack thereof.

The pressures of water supply and future demand for the Phoenix AMA as outlined here are believed sufficient to prejudice any state court, including the Arizona Supreme Court, in the adjudication of Indian water rights in the W-1 proceeding, particularly as related to the water rights of the White Mountain Apache Tribe on the Fort Apache Indian Reservation. The White Mountain Apache Tribe is the only Indian Tribe that can significantly impact the future water supply of the Salt River.

The supply of water available from the Salt River as determined by SRP at a level of 906,800 acre-feet annually is the largest component of renewable water supply available to the Phoenix AMA. The degree of participation in the renewable surface waters of the Salt River as reflected by SRP in the 906,800 acre-feet annually is unknown and must be determined. If information is not available from SRP, comparable information is needed from the Bureau of Reclamation.

TRIBE'S ADDITIONAL CONCERNS REGARDING S. 437

The Arizona Water Settlement Act allocates 653,000 acre feet to the Gila River Indian Community. This allocation to a single Indian Tribe prejudices the claims of other Indian Tribes and prevents their development by the allocation of all reasonably foreseeable water and funding to a single Arizona Tribe. This may be desirable from the standpoint of the State's interest to focus all remaining water supply and

*Tables 1 and 2 have been retained in subcommittee files.

all funding sources on a single Tribe that can have the least impact on the Salt River Project. In the meantime, the Salt River Project would retain the most valuable water supply in the Phoenix Valley for the reason that no pumping costs are involved, the water quality is good and the regulated supply is firm and is not dependent on the Colorado River Basin Compact, which is an undependable and over appropriated supply of water for Arizona. The proposed settlement would rely on Central Arizona Project water, primarily low priority agricultural water, and would "dry up" the lower Colorado Basin Development Fund.

GILA RIVER INDIAN COMMUNITY'S AND UNITED STATES' RESERVATION OF RIGHTS TO OPPOSE WHITE MOUNTAIN APACHE TRIBE'S USE OF WATER

The White Mountain Apache Tribe is particularly alarmed about the scope of paragraph 28.1.4 in the Gila River Indian Community Agreement, which will be confirmed and ratified by S. 437. Paragraph 28.1.4 states:

> "the Community and the United States reserve and retain the right to challenge or object to any claim for use of water by or on behalf of the following persons or entities:
> 28.1.4.1 "the White Mountain Apache Tribe of the Fort Apache Reservation, Arizona;"

In addition to listing the White Mountain Apache Tribe, the Yavapai Apache Nation of the Camp Verde Indian Reservation, the Tonto Apache Tribe of Arizona, the San Carlos Apache Tribe of the San Carlos Reservation, the Yavapai Prescott Tribe of the Yavapai Reservation, Arizona, the Salt River Pima Maricopa Indian Community of the Salt River Reservation, Arizona, and the Fort McDowell Mohave-Apache Community of the Fort McDowell Indian Reservation, Arizona are also listed.

Paragraph 28.1.4.1 aligns the power of the United States against the White Mountain Apache Tribe and authorizes the United States to breach its trust obligation to protect the retained and reserved water rights and vested property rights of the White Mountain Apache Tribe. Moreover, the provision creates an intolerable and irreconcilable conflict of interest on the part of the Trustee United States which has filed substantial claims for the Tribe in both the Gila River and Little Colorado River General Stream Adjudications. This reservation by the United States to oppose the use of water by the White Mountain Apache Tribe is also subject to being read together with Section 207(c) of the Arizona Water Settlement Act which provides:

> "The United States shall not assert any claim against the State (or any agency or political subdivision[6] of the State) or any other person, entity, or municipal or other corporation under Federal, State, or other law *in the own right of the United States* or on behalf of the Community, Community members and allottees, for any of the claims described in subsection (a)." (Emphasis added).

Although, Section 207(a) only includes those claims that could be raised or asserted by the Gila River Indian Community, Community members and allottees, Section 207(c), as punctuated and written in the disjunctive, is subject to the interpretation that the United States shall not assert any claim on behalf of the White Mountain Apache Tribe or any other Tribe which it has asserted or could assert in the name of the United States in addition to whatever claims the United States could raise on behalf of the Community, Community members and allottees.

The Tribe opposes the Act's ratification of existing and proposed agreements for the Salt River Project to deliver Salt River Project water to cities and communities outside the Project area. The Bureau of Reclamation Act establishing the Salt River Project provides that Salt River water cannot be delivered outside the Project area unless there is a surplus. There is no surplus. Moreover, the Salt River Project has no right to dispose of water from the Salt River System without considering the reserved water rights of the White Mountain Apache Tribe. An Act of Congress that confirms delivery agreements of Salt River water outside the Salt River Project area without setting aside or considering the reserved rights of the White Mountain Apache Tribe, may constitute a taking of the Tribe's vested property rights in violation of the Fifth Amendment of the United States Constitution.

The White Mountain Apache Tribe requests express and explicit exclusion from paragraph 28.1.4.1 of the Gila River Indian Community Agreement and from section 207(c) of S. 437. The Tribe also requests an express and explicit exclusion of its re-

[6] The Salt River Project as defined in S. 437, means "the Salt River Project Agricultural Improvement and Power District, a political subdivision of the State, and the Salt River Valley Water Users' Association, an Arizona Territorial Corporation."

served water rights from S. 437 to make unequivocally clear that none of the agreements entered into by the Salt River Project with cities, towns or irrigation districts outside of the Salt River Project area for Salt River water, truncates, diminishes, or amounts to a taking of any kind of the reserved Salt River rights of the White Mountain Apache Tribe. If S. 437 is not designed to take, extinguish or otherwise denigrate the reserved water rights of the White Mountain Apache Tribe to the Salt River, then it will be of no moment to explicitly state so in S. 437.

A McCarran Amendment—General Stream Adjudication, must be *inter sere.* The Arizona Water Settlement Act "grandfathers" in, confirms and legislatively ratifies existing uses of the Salt River and its tributaries without an *inter sere* adjudicatory determination of the reserved water rights of the White Mountain Apache Tribe vis-a-vis downstream junior water users thereby removing from the General Stream Adjudication a necessary requirement for McCarran Amendment jurisdiction in the State Court. Accordingly, the Arizona Water Settlement Act may violate the Separation of Powers Doctrine because Congress is in effect being asked in S. 437 to adjudicate by legislation the *inter sere* rights of the White Mountain Apache Tribe to the use of water in the Gila River System. A similar attempt was made by the State of Arizona in its 1995 Water Code with like impact on Indian reserved water rights but was successfully challenged by the San Carlos Apache Tribe in the Arizona Supreme Court. S. 437 seems, in part, to plow the same unconstitutional ground the Arizona State Legislature did in 1995.

CONCLUSION

The White Mountain Apache Tribe respectfully requests that S. 437 not be approved by the Committee unless and until the reserved water rights of the White Mountain Apache "Tribe are specifically named and protected by explicit and express exclusionary language, that paragraphs 28.1.4 and 28.1.4.1 of the Gila River Indian Community Agreement be deleted, and that the Act provide for and set aside sufficiently for depletion of the Salt River by the White Mountain Apache Tribe to the extent of its Salt River claims, i.e. 260,000 acre feet annual diversion with corresponding depletion.

STATEMENT OF KENO HAWKER, MAYOR, CITY OF MESA, AZ

Chairman Murkowski, Chairman Campbell, and members of the committees, as the Mayor of the City of Mesa, Arizona, I appreciate the opportunity to submit this testimony in support of Senate Bill 437 ("S. 437"). The City of Mesa provides water service to approximately 435,000 people in tour cities and across two counties. The importance of S. 437 to Mesa, its customers, and other water users throughout Arizona cannot be underestimated.

You will hear a great deal of testimony about the benefits of the Arizona Water Settlements Act. You will hear talk of the stability, certainty in water resources planning, cessation of costly litigation, and reduced CAP repayment obligation that the settlement brings to the State of Arizona. You will hear of the benefits the settlement brings to the federal government, including an increased share of CAP water that can be used by the federal government to meet its trust responsibilities towards the many Native American communities within Arizona. The City of Mesa shares in these important benefits and values them greatly, but I want to emphasize the value of some of the unique benefits that the City of Mesa in particular realizes from this Act.

Through this settlement and its enabling legislation, Mesa will receive an additional allocation of 7,115 acre-feet per year of CAP M&I priority water that is vital to ensuring Mesa's sustainable growth and development. Mesa also will gain the option to lease Gila River Indian Community CAP water in the future, again adding to the pool of water Mesa can use for its future.

Most importantly, however, the City of Mesa is undertaking a water exchange with the Gila River Indian Community. Mesa will deliver 29,400 acre-feet per year of high quality reclaimed water to the reservation boundary and in exchange will receive 23,530 acre-feet of CAP water that Mesa can use in its potable system. This exchange is essential to the City of Mesa. The exchange affords Mesa the opportunity to efficiently convert what is a non-drinking water source into a drinking water resource that can be used to meet growing municipal and industrial demands. The exchange allows the Gila River Indian Community to increase the size of its water budget and use this high quality water for agricultural purposes at a very low price. Mesa has a history of partnership with its neighbor the Gila River Indian Community in the redevelopment of what was Williams Air Force Base, and strongly values the opportunity to partner again with the Community in a project that

can bring so many benefits to both communities. The proposed reclaimed water exchange allows both entities to manage water in a regional, conjunctive, and efficient manner that brings great benefits to the residents of both communities.

For these reasons and others, The City of Mesa strongly endorses the Arizona Water Rights Settlements Act and urges your support of S. 437.

Thank you for the opportunity to provide written testimony.

STATEMENT OF EARL ZARBIN, PHOENIX, AZ

Dear Committee: This message is offered to let you know that there is in Arizona opposition to S. 437. One reason is that thirteen tribes with little more than one (1) percent of the state's year 2000 population already control 44 percent of Arizona's annual Colorado River entitlement, and S. 437 would increase that control to slightly more than 51.5 percent. A second major reason to reject this legislation is that the tribes receiving additional water do not intend to use all of the water on their reservations. Tribes already are leasing more than 40,000 acre-feet of water to cities and a community developer, and one tribe, the Gila River Indian Community, immediately plans on leasing 40,000 acre-feet to Phoenix and other cities.

This is unjust enrichment, because tribes have paid not a penny for construction of the Central Arizona Project, through which Colorado River water is delivered to them and other users, and because the tribes are receiving tens of millions of dollars in lease payments. It is not the price of the water that it is of concern. It is the principle that no user, in a water-short state like Arizona, should receive excess quantities of water to lease off reservation. These things are being done with the excuse that giving the Indians water to which they are not entitled historically, legally, morally or ethically will give cities certainity as to their water supplies. Another excuse is that it will end litigation, but that is not true.

Another excuse is that the leases provide the Indian tribes with income. Some of these tribes already are earning multiple tens of millions of dollars through gambling casino profits. There is much, much more that can and should be said about the problems with S. 437—just one example: the so-called Gila River Agreement with the Gila River Indian Community is more than 2,000 "mind-bending" pages, and this writer will be pleased to provide information.

Please enter into the record of the forthcoming hearing that there is opposition to S. 437, and please schedule in Arizona hearings so that all Senators will have an opportunity to get more of the story about why there is opposition.

Thank you.

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